

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES

October Term, 1911.

No. 170.

DAVID McDERMID, Appellant,

THE CITY OF OKLAHOMA, City, et al.,

Appellants, v.  
THE UNITED STATES, Appellee.

---

FILED MAY 16, 1912.

(22,000)

(23,680)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 170.

DAVID McCORMICK, APPELLANT,

*vs.*

THE CITY OF OKLAHOMA CITY ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.

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a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1912, of said Court, Before the Honorable Elmer B. Adams and Honorable Walter I. Smith, Circuit Judges, and the Honorable Charles A. Willard, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,  
*Clerk of the United States Circuit Court  
of Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the twenty-fifth day of October, A. D. 1911, a transcript of record pursuant to an appeal allowed by the Circuit Court of the United States for the Western District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein David McCormick is Appellant and The City of Oklahoma City, a municipal corporation, et al., are appellees, which said transcript of record as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, pursuant to the stipulation and agreement of the parties, for use of the Court upon the hearing of said cause, is in the words and figures following, to-wit:

1      *Stipulation and Agreement as to Printing Record.*

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

No. 3690.

DAVID McCORMICK, Appellant,  
vs.  
CITY OF OKLAHOMA CITY and HENRY M. SCALES, Mayor of Oklahoma City, et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

*Stipulation.*

Whereas, the appellant served upon the appellees a designation as to the portions of the record he desired to have printed, which designation is dated August 12, 1911 and served upon the appellees on the same date, and the parties to this action being desirous of shortening the record,

It is Hereby Stipulated and agreed by and between the appellant, David McCormick and the said appellees, to-wit: The City of Oklahoma City, Henry M. Scales, Mayor of Oklahoma City; George Hess, as City Clerk of Oklahoma City; W. C. Burke as City Engineer of Oklahoma City, Mont. F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. F. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers; and R. F. Helm, as Councilmen within and for Oklahoma City; that the Clerk of the above entitled court shall cause to be printed that portion of the record as hereinafter indicated in this stipulation, and shall omit from the printing in said record, the portions of the transcript indicated below, as follows, to-wit:

Print—Citation and acceptance of service, page *a*.

Print—Bill of Complaint, pages 1 to 50, inclusive.

Print—Exhibit A attached to Bill of Complaint, being General Specifications for paving and curbing of Oklahoma City, Oklahoma, found on pages 51 to 82, inclusive.

Print—Restraining Order filed February 19, 1909, pages 83 to 86, incl. The Copy of Restraining Order being same as original, omit reprinting it, but print certificate of Harry L. Finley, Clerk of U. S. Circuit Court, thereto on page 90.

Print—The return of John R. Abernathy, U. S. Marshal, page 91.

Print—Motion to Modify Restraining Order, on pages 94 and 95.

2 Print—Petition of R. F. Conway Company to be made party defendant, on page 96.

Print—Amendments to the Bill of Complaint, on pages 97 and 98.

Print—Order of March 8, 1909, denying application for Temporary Injunction on page 99.

Print—Memorandum opinion on application for Temporary Injunction on pages 100 to 102, inclusive.

Print—Answer found on pages 103 to 105, inclusive.

Print—Replication found on pages 106 and 107.

Print—Affidavits for Complainants as follows:

Exhibit J, Affidavit of R. E. Brownell on page 108.

Exhibit K, Affidavit of William W. Robinson on pages 109-110.

Exhibit L, Affidavit of David McCormick on pages 111 and 112.

Exhibit M, Affidavit of David McCormick on page 113.

Print—Stipulation as to evidence and hearing of cause, pages 114-117.

Omit—Stipulation on pages 122 to 125 inclusive, being same as stipulation printed in transcript on pages 114 to 117, incl.

Testimony and Evidence for Plaintiff, as follows:

Print—All of pages 126 and 127 of transcript as the same appears therein on pages 126 and 127.

Print—Exhibit C, Minutes of Meeting of City Council of November 2, 1908, found on page 128.

Print—Exhibit F, Minutes of Meeting of City Council of November 4, 1908, awarding contracts for paving certain streets to David McCormick, being all of transcript beginning at Exhibit F on page

128 of transcript and including all matter printed in said transcript down to and including that part of page 135 above Exhibit G.

Print—Exhibit G, Minutes of Meeting of City Council, November 9, 1908 on page 136.

Print—Exhibit H, Minutes of Meeting of City Council, November 10, 1908, on page 137.

Print—Exhibit I, Minutes of Meeting of City Council, November 11, 1908, on page 137.

Omit—Exhibit J, appearing on page 139, it being same as Exhibit J appearing on page 108 of transcript.

Omit—Exhibit K appearing on pages 140 and 141, being the same as Exhibit K appearing on pages 109 and 110 of transcript.

Omit—Exhibit L appearing on pages 142 and 143 of transcript, being the same as Exhibit L appearing on pages 111 and 112 of transcript.

Omit—Exhibit M appearing on page 144 of transcript, being the same as Exhibit M on page 113 of transcript.

3 Print—That part of record on page 145 above and including the words "Complainant Rests" found on page 145.

Print—Beginning on page 145 of transcript immediately following words "Complainant Rests" down to and including page 198.

Print—Beginning at the top of page 199 down to and including page 207.

Omit—Printing Exhibit 37 which begins at top of page 208 of transcript and including all the transcript down to and including page 289, being original bill and Exhibit A attached thereto, which exhibit is the General Specification for paving, and the original bill and Exhibit A thereto attached are heretofore printed in this record.

Omit—Printing Exhibit 38, being Amendment to Bill of Complaint and appearing on pages 290 and 291 of record, same being heretofore printed in record.

Print—Exhibit A, being Paving Resolutions numbered 1, 2 and 4 beginning at top of page 292 of transcript and including all matter down to and including page 295 thereof.

Print—Exhibit B, being Resolution of Mayor and City Council of the City of Oklahoma City, beginning at top of transcript down to and including all of page 297.

Print—Exhibit D, being Notice to paving contractors, beginning at top of page 298 of transcript and including all of transcript down to and including all of page 301 thereof.

Print—Exhibit E, being Notice to Paving Contractors, beginning at top of page 302 of transcript and including all of page 304 thereof.

Print—Proposal of David McCormick, dated November 2, 1908, for paving 19th Street from Dewey to Western, found on page 305 and 306 of transcript.

Omit—Printing Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, being proposals of David McCormick for the paving of all of the streets other than that included in Exhibit 1 and which are involved in this action, and which above exhibits begin on page 307 of record and end on page 340 thereof, each of



said exhibits being the same in form as Exhibit 1, but covering different streets and different prices.

Print—Council Proceedings under date of November 11, 1908 (Council Journal No. 12, page 251) beginning at top of page 341 and including all of transcript down to and including page 358.

Print—Contract of David McCormick, dated November 4, 1908, for paving 19th street from the east line of Dewey Avenue to the east line of Western Avenue, found in transcript beginning at top of page 359 and ending at bottom of page 364 thereof.

Omit—From printing the seventeen contracts of David McCormick for paving certain streets and which are found in transcript beginning at top of page 365 and ending at bottom of page 466, each of said contracts being the same in form as the contract of David McCormick heretofore printed, but said contracts cover different streets and are for different prices.

Print—Beginning at top of page 467 down to but omitting the word "Rule No. 1", being the heading of what purports to be rules of City Council.

Print—Rule 12 of what purports to be Rules of City Council, found on page 469.

Print—On page 470, beginning with words "Rule 19" and print remainder of page.

Omit—Printing that part of transcript beginning at top of page 471 down to and including all of page 513, being Contracts and Bonds of R. F. Conway which are same in form as contract and bond immediately following this recitation except as to streets and amounts.

Print—Contract of R. F. Conway Company, beginning at top of page 514 down to and including all of page 516 of transcript.

Print—Bond of R. F. Conway found on page 517 of transcript.

Omit—Printing that part of transcript beginning at top of page 518 down to and including all of page 541 of transcript, the same being contracts and bonds of R. F. Conway Company identical in form with the contract and bond last above printed, but which covers different streets and are for different prices.

Print—Affidavit of Thomas R. Cliff, Court Reporter, found on pages 542 and 543 of transcript.

Print—Affidavit of Foxhall P. McCormick, found on pages 544 and 545 of transcript.

Print—Affidavit of David McCormick, found on pages 546 and 547 of transcript.

Omit—Printing page 548 of transcript.

Print—Beginning at top of page 549 of transcript down to and including all of page 550 thereof.

Omit—Printing all that part of transcript beginning at page 551 down to and including page 568 of transcript, the same being exhibits numbered 19 to 36, inclusive, and being maps or profiles of the streets to be paved and which are covered by the contracts involved in this action, but the consideration of which would not aid in the determination of the matters involved herein.

Print—All of page 569 of transcript.

Print—Beginning at top of page 570 of transcript down to and including all of page 571, being decree of Court.

5 Print—All of page 572 of transcript.

Print—Assignment of Errors, beginning at top of page 573 of transcript down to and including all of page 575 thereof.

Print—Petition for Appeal and Order granting same, being all of pages 576 and 577 of transcript.

Print—Bond on appeal, beginning at top of page 578 of transcript down to and including all of page 579 thereof.

Print—Designation of record to be printed beginning at top of page 580 of transcript down to and including all of page 582.

Print—Notice to have entire record sent to Circuit Court of Appeals, found on page 583 of transcript.

Print—Order extending time for filing record in Circuit Court of Appeals, found on page 584 of transcript.

Print—Certificate of Clerk of U. S. Circuit Court for Western District of Oklahoma, found on page 585 of transcript.

It is further hereby stipulated and agreed that wherever any portion of the record is to be omitted, that the Clerk shall cause to be inserted in the printed record language indicating that the omission was by agreement of the parties. It is further stipulated and agreed that wherever the designation for printing of the record filed by the appellant shall be in apparent conflict with this stipulation, and agreement, that this stipulation shall prevail and that the record shall be printed in conformity with this stipulation.

It is further hereby stipulated that this agreement shall be printed in the record.

Dated this 4th day of December, A. D. 1911.

JOHN DEVEREUX AND  
BURWELL, CROCKETT & JOHNSON,  
*Counsel for Appellant.*

J. W. JOHNSON,  
*Counsel for All of the Above-named Appellees.*

Filed in the Circuit Court of Appeals on Dec. 11, 1911.

*Citation.*

In the Circuit Court of the United States for the Western District of Oklahoma.

DAVID McCORMICK, Plaintiff.

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation; HENRY M. Scales, Mayor of said City; George Hess, Clerk of said City; W. C. Burke, City Engineer of said City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers and R. T. Helm, Constituting the Councilmen of said City, Defendants.

To the City of Oklahoma City, a Municipal Corporation; Henry M. Scales, Mayor of said City; George Hess, Clerk of said City; W. C. Burke, City Engineer of said City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers and R. T. Helm, Constituting the Councilmen of said City, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis Missouri sixty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's Office of the Circuit Court of the United States for the Western District of Oklahoma, wherein David McCormick is Appellant and you are Appellees, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned — and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John H. Cotteral, Judge of the Circuit Court of the United States, for the Western District of Oklahoma, this 25th day of July, A. D. 1911.

JOHN H. COTTERAL,  
*Judge of the United States Circuit  
Court for the Western District of  
Oklahoma.*

Service of this citation accepted and receipt of a copy thereof acknowledged this 25th day of July, 1911.

J. W. JOHNSON,  
FLYNN, AMES & CHAMBERS,  
G. A. PAUL,  
*Solicitors for the Defendants, Appellees.*

Filed in the Circuit Court on July 25, 1911.

In the Circuit Court of the United States in and for the Western District of the State of Oklahoma.

Bill in Equity.

DAVID McCORMICK, a Resident and Citizen of the City of St. Louis and of the State of Missouri, Complainant,

vs.

THE CITY OF OKLAHOMA CITY, a Corporation, Duly Organized and Incorporated under the Laws of the State of Oklahoma;  
7 Henry M. Scales as Mayor of the City of Oklahoma City;  
Geo. Hess, as Clerk of the City of Oklahoma City; W. C. Burke, City Engineer of the City of Oklahoma City; Mont. F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers, and R. F. Helm, as Councilmen, within and for the City of Oklahoma City, Each and All of Whom are Residents and Citizens of the Western Judicial District of the State of Oklahoma, Defendants.

To the Hon. the Judges of the Circuit Court of the United States for the Western Judicial District of the State of Oklahoma:

Now comes David McCormick, who is a resident and citizen of the city of St. Louis, in the state of Missouri, and brings this, his action in equity, against the city of Oklahoma City, which is a resident and citizen of the State of Oklahoma, and is a municipal corporation organized and incorporated under the laws of the said state, being located in Oklahoma County, in said State of Oklahoma, and against the said defendants, Henry M. Scales, who is now and has been for more than one year last past, the duly elected, qualified and acting Mayor of the said city of Oklahoma City, and against George Hess, who is now and has been for more than one year last past, the duly elected, qualified and acting City Clerk within and for said City of Oklahoma City and against W. C. Burke, who is and has been for more than one year last past, the duly elected, qualified and acting City Engineer within and for said City of Oklahoma City and against Mont. F. Highley, O. P. Workman, A. W. Williams, W. T. Corder, L. L. Land, M. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers, and R. F. Helm, each and all of whom are now and have been for more than one year last part the duly elected, qualified and acting councilmen within and for the said city of Oklahoma City and that each and all of said persons were acting in their respective capacities aforesaid during all of the times referred to in this bill, and during the performing of all of the acts hereinafter complained of; and your orator further alleges, avers and states and shows to your Honors that the said Mont F. Highley is at this time and has been for more than one year last past, the duly elected, qualified and acting president of the City Council within and for the said City of Oklahoma City in said Oklahoma County and State of Oklahoma, and that during the absence of the Mayor of said city, it be-

comes and is the duty of the said Mont F. Highley to pre-  
 8 side at all meetings of the city council and to act in the  
 capacity of Mayor of said city of Oklahoma City; and your  
 orator further shows that each and all of said defendants are resi-  
 dents and citizens of said State of Oklahoma, residing in said Okla-  
 homa County and in said State of Oklahoma, within the Western  
 Judicial District of the said State of Oklahoma.

And your orator further alleges, avers and states, and shows to  
 your Honor that said defendant, the city of Oklahoma City has its  
 principal office and place of business within said County of Okla-  
 homa, and within the Western Judicial District of said State of  
 Oklahoma. And your orator further alleges, avers, and states and  
 shows to your Honors that this is a suit in Equity, and that the mat-  
 ters in dispute exceeds, exclusive of interest or costs, the sum or value  
 of \$2,000.00, and that this action involves a controversy between  
 citizens of different states.

2. Your orator further alleges, avers and states and shows to your  
 Honor that the City of Oklahoma City by its Mayor and city coun-  
 cil duly assembled, duly and regularly passed certain resolutions to  
 pave certain of the streets of said city of Oklahoma City, which reso-  
 lutions were duly and legally passed by the said city council within  
 and for Oklahoma City, and were duly approved and adopted by  
 the Honorable Henry M. Scales, Mayor of said city of Oklahoma  
 City and duly attested by the Honorable George Hess, City Clerk for  
 said city of Oklahoma City, by his name as City Clerk and the seal  
 of said corporation on the 21st day of September, 1908. And it was  
 by resolution of the said Mayor and City Council of said City of  
 Oklahoma City declared to be necessary to pave 11th street from the  
 west line of the Atchison, Topeka & Santa Fe Railway Company's  
 right of way to the east line of Robinson Avenue; and to pave Broad-  
 way from the north line of 13th Street to the south line of 14th  
 Street and to pave 14th Street from the east line of Broadway to the  
 east line of Robinson Avenue, and to pave Dale Avenue from the  
 north line of Park Place to the south line of 13th Street and to pave  
 Park Place from the east line of Broadway to the east line of Dale  
 Ave., and to pave 2nd St. from the west line of Western Ave. to the  
 east line of Blackwelder Ave., and to pave 2nd St. from the east  
 line of Blackwelder Ave. to the east line of Ohio Ave., and to pave  
 3rd St. from the west line of Lee Ave. to the west line of Carey and  
 Weavers Addition, and to pave 5th St. from the west line of Walker  
 Ave. to the east line of Western Ave., and to pave 6th St. from the  
 east line of Walker Ave. to the east line of Lee Ave., and to pave

9th St. from the east line of Dewey Ave. to the east line of  
 9 Shartel Ave., and to pave Shartel Ave. from the north line  
 of 4th St. to the south line of 8th St., and to pave Shartel  
 Ave. from the North line of 8th St. to the south line of 11th St.  
 and to pave Jamestown Ave. from the west line of Western Ave.  
 to the east line of Klein Ave. and to pave Walker Ave. from the  
 north line of 13th St. to the north line of 16th St. and to pave  
 Dewey Ave. from the south line of 17th St. to the south line of  
 19th St. and to pave Lee Ave. from the north line of 17th St. to the

south line of 19th St., and to pave Western Ave. from the north line of Main St. to the north line of 17th St. and to pave Classen Boulevard from the north line of 16th St. to the north line of 37th St., and to pave 16th St. from the east line of Shartel Ave. to the east line of McKinley and to pave 18th St. from the west line of Dewey Ave. to the east line of Shartel Ave., and to pave 19th, from the east line of Dewey Ave. to the east line of Western Ave., and to pave California Ave. from the east line of Dewey Ave. to the east line of Shartel Ave., and to pave California Ave. from the east line of Shartel Ave. to the east line of Western Ave. and to pave Washington Ave. from the west line of Broadway to the east line of Robinson Ave., and to pave Washington Ave. from the west line of Robinson Ave. to the east line of Walker Ave. and to pave Robinson Ave. from the south line of the St. Louis and San Francisco Railway right of way to the north line of Ash St. and Lee Ave., and to pave Lee Ave. from the south line of Main St. to the north line of Reno Ave. and to pave Byers Ave. from the north line of 3rd St. to the south line of 4th St. and to pave 6th St. from the west line of Phillips Ave. to the west line of Kelley Ave. and to pave Oklahoma Ave. from the north line of 2nd St. to the south line of 3rd St. and to pave Stiles Ave. from the south line of First St. to the south line of 3rd St. and to pave 11th St. from the east line of Geary Ave. to a point 189.2 ft. east of such point and to pave 12th St. from the east line of Geary Ave. to a point 189.2 ft. east of said Geary Ave., all in the city of Oklahoma City, and State of Oklahoma; and by said resolution it was also resolved and declared necessary to do the necessary grading; to construct man holes and catch basins and to put in inlet pipes, lateral storm sewers and reset curbs along said streets in paving the same; and it was also by said Mayor and City Council at said time and place, and in the same resolution resolved that if the owners of more than one-half in area of the lots, pieces or parcels of ground, liable to assessment for the cost of the above named improvements, which assessments were by said resolution to be included in the cost of improving streets and alleys intersections should not within 15 days after the first publication

10 of said resolution file with the clerk of said city of Oklahoma City their protests in writing against such improvements, and such protest or objection to be made as to each of the above named streets separately, that then, and in that event the Mayor and City Council of the city of Oklahoma City should cause such improvements to be made and contract for the same at the expense of the said lots, pieces or parcels of ground as provided for in House Bill No. 231 of the legislature of the State of Oklahoma, dated April 17th, 1908, entitled: "An Act to provide for the improvement of streets and other public places within cities of the first class by grading, paving, Macadamizing, curbing, guttering and draining the same and declaring an emergency"; and in said resolution it was also resolved and directed by the Mayor and City Council that said resolution should be published in six consecutive issues of the Oklahoma City Times a daily newspaper, published and of general circulation in said city.



Your orator further alleges, avers and states that pursuant to said resolution by the Mayor and City Council, of the city of Oklahoma, aforesaid, said resolution, which was entitled "Paving Resolution No. 1, a resolution to pave portions of certain streets and avenues, was published in six consecutive issues of the Oklahoma City Times, a daily newspaper published and of general circulation in said city of Oklahoma City, and that the first publication of said resolution appeared in said paper on September 23rd, 1908, and that the last publication of said resolution appeared in said paper in the issue dated September 29th, 1908.

3. Your orator further alleges, avers and states and shows to your Honors that the city of Oklahoma City by its Mayor and city council duly assembled, duly and regularly passed certain other resolution—to pave certain of the streets of said city of Oklahoma City, which resolutions were duly and legally passed by the said Mayor and city council within and for Oklahoma City, and were duly approved and adopted by the Honorable Henry M. Scales, the Mayor of said city of Oklahoma City and duly attested by the Honorable George Hess, city clerk for said city of Oklahoma City by his name, as city clerk and the seal of said corporation on the 21st day of September 1908. And it was by another resolution of said Mayor and city council of said city of Oklahoma City,—declared to be necessary to pave Shar-tel Ave. from the north line of 16 st. to the south line of 19th st. and to pave Walker Ave., from the north line of 4th st. to the south line of 6th st.; and to pave 3rd st. from the west line of Robinson Ave. to the west line of Lee Ave.; and to pave Broadway st.

11 from the North line of Washington Ave., to the south line of the east and west alley, between Tena and Choctaw Aves. and to pave Lindsay Ave. from the north line of 4th st. to the south line of 5th st., all in the city of Oklahoma City, Oklahoma county and State of Oklahoma. In the same resolution, it was by said Mayor and city council of the city of Oklahoma City, Oklahoma, declared necessary to do the necessary grading; to construct man holes, and catch basins and to put in inlet pipes, lateral storm sewers, curbs and reset curbs along the streets above described in making said improvements and in the same resolution resolved that if the owners of more than one-half in area of the lots, pieces or parcels of ground liable to assessment for the cost of the above named improvements, which assessments were, by said resolution, to be included in the cost of improving street and alley intersections, should not within fifteen days after the first publication of said resolution, file with the clerk of said city of Oklahoma City, their protest in writing against such improvements, such protest or objection to be made as to each of the above named streets separately, that then and in that event, the Mayor and city council of the city of Oklahoma City, should cause such improvements to be made and contract for the same at the expense of the said lots, pieces or parcels of ground, as provided for in House Bill No. 231 of the Legislature of the [City of Oklahoma City], dated April 17th, 1908, entitled, "An act to provide for the improvement of streets and other public places within cities of the first class by grading, paving, macadamizing, curbing, guttering,



and draining the same and declaring an emergency", and in said resolution it was also resolved and directed by the Mayor and City Council that said resolution should be published in six consecutive issues of the Oklahoma City Times, a daily newspaper, published and of general circulation in said city. Your orator further alleges, avers and states and shows to your Honors that pursuant to said resolution by the Mayor and City Council of the City of Oklahoma City, aforesaid, said resolution, which was entitled "Paving Resolution No. 2", a resolution to pave portions of certain streets and avenues was published in six consecutive issues of the Oklahoma City Times, a daily newspaper published and of general circulation in said city of Oklahoma City and that the first publication of said resolution appeared in said paper on September 23, 1908 and that the last publication of said resolution appeared in said paper in the issue dated September the 29th, 1908.

4. Your orator further alleges, avers and states and shows to your Honors that the city of Oklahoma City by its Mayor and City Council duly assembled, duly and regularly passed certain other  
12 resolutions to pave certain of the streets of the said city of Oklahoma City, which resolutions were duly and legally passed by the said city Council within and for Oklahoma City, and were duly approved and adopted by the Honorable Henry M. Scales, the Mayor of the said city of Oklahoma City and duly attested by the Honorable George Hess, City Clerk for said city of Oklahoma City by his name, as city clerk, and the seal of said corporation on the 21st day of September, 1908. And it was by said resolution of said Mayor and city council of said city of Oklahoma City declared to be necessary to pave 7th st. from the east line of Stiles Ave., to the west line of Stonewall Ave., and to pave Phillips Ave. from the north line of 4th st., to the north line of 10th st., and to pave Shar-tel Ave., from the north line of 19th st. to a point 296. ft. north of the north line of 25th st.; and to pave 6th st. from the west line of Robinson Ave. to the east line of Walker Ave., all in the city of Oklahoma City in Oklahoma County, and State of Oklahoma, and in said resolution it was also by the Mayor and city council of the said city of Oklahoma City declared necessary to do the necessary grading; to construct man holes and catch basins and to put in inlet pipes, lateral storm sewers, curbs and reset curbs, in paving said streets described in said resolution; and in the same resolution, resolved that if the owners or more than one-half in area of the lots pieces or parcels of ground liable to assessment for the cost of the above named improvements, which assessments were by said resolution to be included in the cost of improving street and alley intersections, should not, within fifteen days after the first publication of said resolution, file with the clerk of said city of Oklahoma City their protest in writing against such improvements, such protest or objection to be made as to each of the above named streets separately, that then and in that event, the Mayor and City Council of the city of Oklahoma City should cause such improvements to be made and contract for the same at the expense of the said lots, pieces or parcels of ground, as provided for in House Bill No. 231 of the Legislature

of the [*city of Oklahoma City*], dated April 17th, 1908, entitled, "An act to provide for the improvement of streets and other public places within cities of the first class by grading, paving, macadamizing, curbing, guttering, and draining the same and declaring an emergency", and in said resolution it was also resolved and directed by the Mayor and City Council that said resolution should be published in six consecutive issues of the said *Oklahoma City Times*, a daily newspaper, published and of general circulation in said city. Your orator further alleges, avers and states and shows to your Honors that pursuant to said resolution by the Mayor and City Council of the City of Oklahoma City, aforesaid, said resolution, which was entitled "Paving Resolution No. 3", a resolution to pave portions of certain streets and avenues was published in six consecutive issues of the said *Oklahoma City Times*, a daily newspaper published and of general circulation in said city of Oklahoma City and that the first publication of said resolution appeared in said paper on September 23rd, 1908, and that the last publication of said resolution appeared in said paper in the issue dated September the 29th, 1908.

5. Your orator further alleges, avers and states and shows to your Honors that thereafterwards to-wit on the 19th day of October, 1908, the Mayor and City Council of the City of Oklahoma City in session, duly assembled, duly and regularly passed a certain resolution directing the city engineer in and for the said city of Oklahoma City to prepare plans, specifications and estimate of cost for certain paving, provided for in the resolutions of September 21st, 1908, and which were the same resolutions referred to in this bill in equity, in paragraphs numbered 2, 3, and 4, and which said resolution for the preparing of said plans, specifications and estimates of cost for said paving was duly, and legally passed by said Mayor and city council of the city of Oklahoma City, and was duly recorded by the city clerk in and for said city.

6. Your orator further alleges and shows unto your Honors that on to-wit the 19th day of October, 1908, the Mayor and city council of the city of Oklahoma City in session duly assembled, duly and regularly passed a certain resolution directing the city engineer in and for said city of Oklahoma City to prepare plans, specifications and estimates of cost for certain paving provided for in the resolutions passed by said Mayor and City Council of the city of Oklahoma City on the 21st day of September, 1908 heretofore referred to in this bill and which resolution was duly recorded by the said city clerk of the city of Oklahoma City that in said resolution passed by the said mayor, and said city council of Oklahoma City on October 19th, 1908, it was resolved by said Mayor and city council of said city that whereas a resolution had been passed by said Mayor and city council and regularly published in six consecutive issues of the official paper of said city, providing for certain improvements to be made on certain streets and avenues, as hereinafter described, and that whereas the time for objection or protest on the part of the property owners had expired, and no sufficient protest or objections had been filed and that whereas all the proceedings had been regu-

lar and in due form as provided by law and the mayor and city council having determined to proceed with such improvements in accordance with such resolution; that the following named

14 streets be paved a total width of 30 ft. from face of curb to face of curb, all of said streets being in the city of Oklahoma City, Oklahoma, and that the material to be used in paving of the roadways of said streets should be one and one-half inches of sheet asphalt, one and one-half inches of binder, and five inches Portland Cement Concrete base, and that the necessary grading be done and that catch basins, man holes, concrete curbs and guttering and draining be constructed therefor and that the city engineer of said city be and he was by said ordinance authorized to and directed to prepare plans, plats, profiles, estimates and specifications for such construction, to-wit: that Shartel Ave. be paved from the north line of 16th St. following said avenue in a north and northwesterly direction to a point at which the same intersects the west line of said avenue where the same takes a due north course to be paved a total width of 50 ft.; from thence north to the south line of 19th st., a total width of 30 ft. from face of curb to face of curb; that Walker Ave., from the north line of 4th St. to the south line of 6th St. be paved a total width of 36 ft. from face of curb to face of curb; that Broadway be, from the north line of Washington Ave. to the south line of east and west alley, between Choctaw and Tena Aves. be paved a total width of 40 ft. from face of curb to face of curb; that Lindsay Ave. from the north line of 4th st. to the south line of 5th st. be paved a total width of 30 ft. from face of curb to face of curb; and that 3rd st. from the west line of Robinson ave. to the center line of Walker Ave. be paved a total width of 40 ft. and from the center line of Walker Ave. to the west line of Lee Ave. be paved a total width of 30 ft. from face of curb to face of curb. And in said resolution the said Mayor and city council in and for said city of Oklahoma City also resolved and directed that all work done and material furnished should be in strict conformity with plans and specifications of the city engineer therefor, and of the proper quality and test; that the contractor to whom the contract should thereafter be awarded for the construction of such improvements should execute to the city of Oklahoma City a good and sufficient bond in the sum equal to 20 per cent of the contract price, conditioned for the faithful performance of the work and execution of the contract, and for the protection of said city and all property owners, against any and all loss or damage by reason of neglect or improper execution of said work and that the contractor should also execute a good and sufficient bond in the sum of 10 per cent of the contract price, conditioned for the maintenance of said work in a state of good repair for a period of not less than five years, from the date of the completion and acceptance of said work; and in said resolution of

15 October 19th, 1908, the Mayor and city council of the said city of Oklahoma City also resolved that the City Clerk of said city of Oklahoma City, be and he was thereby authorized and directed to advertise for sealed bids for furnishing the material and performing the work necessary for the improvement of the streets

above described in the manner required by law, and it was also therein resolved that bids for the paving of any and all of such streets should be accompanied by certified check in the sum of 3 per cent of the amount of bid and that such check should be forfeited to the city in case the successful bidder failed to enter into contract and give required bond within the time provided for in said resolutions; that said resolution was approved by the Mayor of the said city of Oklahoma City on the 19th day of October, 1908, and was duly signed by said Mayor as such, on said date, and was attested by the city clerk with his official signature and the official seal of said city on said date. And your orator further alleges and shows to your honors that on to wit the 19th day of October, 1908, the Mayor and city council of the city of Oklahoma City also duly and legally passed another resolution in which resolution it was recited that whereas a resolution had been passed by the Mayor and city council of the city of Oklahoma City and regularly published in six consecutive issues of the official paper of said city, providing that certain improvements be made on certain streets and avenues as in said resolution under date of October 19th, 1908, described and also recited that whereas the time for objection or protest on the part of the property owners had expired and no sufficient protest or objection had been filed and that all of the proceedings had been regular and in due form, and as provided by law, and the said mayor and city council having determined to proceed with such improvements in accordance with the said resolutions theretofore passed and in said resolution of October 19th, 1908, it was further resolved by the said Mayor and city council of the city of Oklahoma City that Broadway from the east line of 13th St. to the South line of 14th St.; that 14th St. from the east line of Broadway to the east line of Robinson Ave.; that Park Place from the east line of Broadway to the east line of Dale Ave.; that 5th St. from the west line of Walker Ave. to the east line of Western Ave.; that 6th St. from the west line of Robinson Ave. to the east line of Walker Ave.; that 6th St., from the East line of Walker Ave., to the east line of Lee Ave.; that 9th St. from the east line of Dewey Ave. to the east line of Shartell Ave.; that Shartell Ave. from the north line of 4th St. to the south line of 8th St.; that Shartell — from the north line of 19th St. to the point 296 ft. north of the north line of 25th St.; that Walker Ave. from the north line of 13th St. to the north line of 16th St.; that California Ave., from the east line of Shartell Ave. to the east line of Western Ave.; that Washington Ave. from the west line of Broadway to the west line of Robinson Ave.; that Washington Ave. from the west line of Robinson Ave. to the east line of Walker Ave.; that Lee Ave. from the south line of Main St. to the North line of Reno Ave. be paved total width of 30 ft. from face of curb to face of curb; that 19th St. from the east line of Dewey Ave. to the East Line of Western Ave.; that Oklahoma Ave. from the North line of 2nd St. to the south line of 3rd St.; that 11th St. from the east line of Geary Ave. east 189 ft., that 12th St. from the north line of Geary Ave. east 189.2 ft., each to be paved a total width of 28 ft. from face of curb to face of curb;

that Dale Ave. from the north line of Park Place to the South line of 13th st.; that 2nd St. from the west line of Western Ave. to the east line of Blackwelder Ave.; that 2nd St. from the east line of Blackwelder Ave. to the east line of Ohio Ave.; that Jamestown Ave. from the west line of Western Ave. to the east line of Klein Ave.; that Dewey Ave. from the north line of 17th St. to the south line of 19th St.; that Lee Ave. from the north line of 17th St. to the south line of 19th St.; that 16th St. from the east line of Shartel Ave. to the east line of McKinley Ave.; that 18th — from the West line of Dewey Ave. to the east line of Shartel Ave.; that 6th st. from the west line of Phillips Ave. to the west line of Kelley Ave.; that 7th st. from the east line of Stiles Ave. to the west line of Stonewall Ave.; that Stiles Ave. from the south line of 1st St. to the south line of 3rd St.; that Phillips Ave. from the north line of 4th St. to the north line of 10th St.; that Shartel Ave. from the north line of 8th St. to the south line of 11th St. [St.], each be paved at total width of 26 ft. from the face of curb to face of curb; that 11th St. from the east line of Robinson Ave. to the North and south alley between Robinson Ave. and Broadway, each be paved a total width of 30 ft. and from said alley east to the west line of the A. T. & S. F. Railway right of way be paved a total width of 26 ft. from face of curb to face of curb; that Western Ave. from the north line of Main St. to the south line of 15th St., be paved a total width of 30 ft. from face of curb to face of curb, and from the south line of 13th St. to the south line of 16th st., be paved with a double drive way a total width of 20 ft. from face of curb to face of curb, on each side of the street car company's right of way including the full width of the street intersections and from the south line of 16-st. to the North line of 17th St. be paved a total width of 30th st. from face of curb to face of curb; that Classen Boulevard from the north line of 16th st. to the north line of 27- st. be paved  
17 with a double driveway 23 ft. from face of curb to face of curb on each side of the street car right of way including the full width of the street intersections; that California Ave. from the east line of Dewey Ave. to the east line of Shartell Ave. be paved a total width of 40 ft. from face of curb to face of curb; that 3rd St. from the west line of Lee Ave. to the east line of Carey and Weaver's addition be paved a total width of 30 ft. or from the east line to the west line of said addition be paved a total width of 26 ft. from face to curb to face of curb; that Byers Ave. (which is an irregular st.) from the north line of 3rd St. to the south line of 4th st. be paved its total width from property line to property line all of said streets being in the city of Oklahoma City, Oklahoma county and state of Oklahoma and in said resolution it was also resolved that the material used in the paving of the roadways of said streets should be one and one-half inches of sheet asphalt; one-half inches of binder and five inches of Portland Cement, concrete base and that the necessary grading be done and catch basins, man holes, concrete curb and guttering, and draining be constructed therefor and that the city engineer of said city be and he was by said resolution authorized and directed to prepare plans, plats, profiles, estimates

and specifications for such construction. And in said resolution it was by said Mayor and city council in and for Oklahoma City further resolved that all work done and material furnished should be in strict conformity to the plans and specifications and estimates of the city engineer therefor, and of the proper quality and test; that the contractor to whom the contract should be awarded for the construction of such improvements, should execute to the said city a good and sufficient bond in the sum equal to 20 per cent of the contract price, conditioned for the faithful performance of the work and execution of the contract and for the protection of the city and all property owners against any and all loss or damage by reason of neglect or improper execution of the work; and that said contractor should also execute to said city a good and sufficient bond in the sum of 10 per cent of the contract price conditioned for the maintenance of said work in the state of good repair for a period of not less than five years from the date of completion and acceptance of said work and in said resolution it was by the mayor and city council of the said city of Oklahoma City further resolved that the city clerk of said city of Oklahoma City be and he was thereby authorized and directed to advertise for sealed bids for furnishing all of the materials and performing the work necessary for the improvement of such streets in a manner required by law and

18 it was also in said resolution resolved by said mayor and city council that each bid should be accompanied by a certified check in the sum of 3 per cent of the amount bid and that such check should be forfeited to the city of Oklahoma City in case the successful bidder failed to enter into contract and give the required bond in the required time, which resolution was passed by the said Mayor and city council of the city of Oklahoma City and was on the same date, to wit the 19th day of October, 1908, duly approved by the Mayor of said city and the signature of said mayor to said resolution was attested by the city clerk, George Hess, by his official signature and the corporate seal of said city of Oklahoma City.

7. Your orator further alleges and shows to your honors that pursuant to the resolutions passed by the said Mayor and City Council of the city of Oklahoma City described and referred to in paragraphs 6 and 7, directing the City Engineer in and for the said city of Oklahoma City to prepare plans, specifications, profiles, and estimate of cost of the paving referred to, in said resolutions and the said city engineer in and for Oklahoma City prepared certain general specifications for paving and curbing and also specifications with reference to asphalt paving which specifications were all filed with the city clerk in and for Oklahoma City, and which specifications provided in detail the rules which should be followed in making said improvements, the material to be used and made full and explicit recitations and details with reference to each part of said improvement; that said plans and specifications and estimates and details, prepared by the city engineer as aforesaid constitute a part of the contract for the performing of all of the work provided for in the resolutions of the city council referred to in this bill in equity; that said plans and specifications are very long and that it would be exceedingly burdensome to set out in detail the intendment of said



instrument or according to the legal effect of said plans, and specifications and your orator further states that the said bill in equity would not be materially shortened by alleging the legal effect of said plans, specifications and estimates from which it would be if a copy thereof were included herein and by reason thereof and the impracticability of pleading the legal effect of the different provisions of said plans and specifications, your orator here refers to said plans and specifications and attaches the same to this bill in equity, marks the same Exhibit "A" and makes the said exhibit a part hereof.

8. Your orator further alleges and shows to your Honors that the said city engineer within and for the City of Oklahoma City pursuant to the resolutions and directions of the Mayor and

19 City council in session duly and regularly assembled, also prepared plans and profiles for certain paving provided for by the resolutions of the Mayor and City Council heretofore referred to in this bill in equity, which plans and profiles show in detail the streets to be paved, the width of paving and all other matters in connection with the paving of said streets, which should properly be shown on plans and profiles for the guidance of the city and the contractor to whom a contract for such improvement might be awarded and, which plans and profiles are upon large sheets of paper or canvas, several feet in length and are very bulky and cannot be accurately described as to streets to be paved and the work to be performed as indicated thereby in brief and succinct language, but your orator here offers to furnish said plans and profiles should the same be desired by the court; that said plans and profiles were eighteen in number, which show upon their face the different streets and alleys to be paved respectively.

9. Your orator further alleges and shows to your honors that thereafterwards to-wit on October 19th, 1908, the Mayor and city council within and for the city of Oklahoma City, by motion duly carried and passed by resolution and motion as aforesaid, adopted the plans, specifications and estimates etc. prepared by the said city engineer for the improvements referred to heretofore in this bill in equity, and said Mayor and city council by resolution duly and legally ordered on said date, that advertisement for bids call for a ten year guarantee; that at said meeting of said city council, the city engineer, W. C. Burke submitted plans, specifications, estimates, profiles, etc. for the paving of the streets as described in this bill in equity and as described in the resolution of the Mayor and city council, referred to herein, which plans, specifications, estimates, profiles, etc. were at said time by said Mayor and city council by resolution duly approved and that afterwards on to-wit, the 20th day of October, 1908, the said Mayor and city council in session duly assembled, duly and regularly voted to reconsider the resolution providing that bids should be for a ten year guarantee and provided by resolution at said meeting on the 20th day of October, 1908, that the plans and specifications of the city engineer for the paving of the streets referred to in this bill in equity be changed so as to provide for bids for a five and ten year guarantee.

10. Your orator further alleges and shows to your Honors that



pursuant to the resolution, order and direction of the Mayor and city council, said city clerk in and for the city of Oklahoma City advertised for bids for the making of the improvements and

20 for the paving of the streets referred to in this bill in equity; that the resolution of said Mayor and city council of the city of Oklahoma City, directing the clerk to advertise for bids for said improvements was duly and regularly passed; that said notice was entitled "Notice to paving Contractors" and was published as provided by law, continuously in each issue of said "The Oklahoma City Times", from and including the 21st day of October, to and including the 31st day of October, 1908, and said notice so published provided that in accordance with resolutions passed by the mayor and city council on October 19th, 1908, sealed bids would be received at the office of George Hess, city clerk up to 5 o'clock P. M. on November the 2nd, 1908, and would be considered by the Mayor and City Council at the council's chamber, at the city hall at 8 o'clock P. M., on said date for the paving of the following described streets with asphalt according to the plans and specifications then on file in the office of the city clerk; that bids should be made on each street separately, which streets for which bids were asked for in said notice were in the city of Oklahoma City and as follows to-wit: Broadway from the N. line of 13th st. to the south line of 14th St.; 14th st. from the East line of Broadway to the East line of Robinson; Park Place from the east line of Broadway to the east line of Dale Ave.; 5th St. from the west line of Walker Ave. to the east line of Western Ave.; 6th St. from the west line of Robinson Ave. to the east line of Walker Ave.; 6th st. from the east line of Walker Ave., to the east line of Lee Ave. 9th st. from the east line of Dewey Ave. to the east line of Shartel Ave. Shartel Ave. from the north line of 4th st. to the south line of 8th st. Shartel Ave. from the north line of 19th st. to a point 296 ft. north of the north line of 25th st.; Walker Ave. from the north line of 13th st. to the north line of 16th st.; California Ave. from the east line of Shartel Ave. to the east line of Western Ave.; Washington Ave. from the west line of Broadway to the east line of Robinson Ave., Washington Ave. from the west line of Robinson Ave. to the ats line of Walker Ave., and Lee Ave. from the south line of Main st. to the north line of Reno Ave., be paved a total width of 30 ft. from face of curb [from] face of curb; 9th st. from the east line of Dewey Ave. to the east line of Western Ave.; Okla. Ave., from the north line of second st. to the south line of 3rd st.; 11th St. from the east line of Geary Ave., east 189.2 ft.; 12th St. from the east line of Geary Ave., east 189.2 ft. each be paved a total width of 28 ft. from face of curb to face of curb. Dale Ave. from the north ave. of Park place to the south line of 13th St., 2nd st. from the west line of Western Ave. to the east line of

21 Blackwelder. 2nd St. from the east line of Blackwelder to the east line of Ohio Ave.; Jamestown Ave. from the west line of Western Ave. to the east line of Klein Ave. Dewey Ave. from the north line of 17th st. to the south line of 19th st. Lee Ave. from the north line of 17th st. to the south line of 19th st. 13th St. from the east line of Shartel Ave. to the east line of McKinley Ave. 18th

St. from the west line of Dewey Ave. to the east line of Shartel Ave.; 6th St. from the west line of Phillips Ave. to the West line of Kelley Ave.; 7th St. from the east line of Stiles Ave. to the west line of Stone-wall Ave. Stiles Ave. from the south line of 1st St. to the south line of 3rd St.; Phillips Ave. from the north line of 4th st. to the north line of 10th St.; Shartel Ave. from the north line of 8th st. to the south line of 11th st.; each be paved a total width of 26 feet from the face of curb to face of curb; Classen Boulevard from the north line — Ave. to the north and south alleys between Robinson Ave. and Broad-way be paved a total width of 30 ft. and from said alley east to the west line of the A., T. & S. F. R. R. Right of way be paved a total width of 26 ft. from face of curb to face of curb; Western Ave. from the north line of Main st. to the south line of 13th st. be paved a total width of 30 ft. from face of curb to face of curb; and from the south line of 13th st. to the south line of 16th St. be paved with a double drive way a total width of 20 ft. from face of curb to face of curb on each side of the street car company's right of way, including the full width of the street intersections and from the south line of 16th st. to the north line of 17th st. a total width of 30 ft. from face of curb to face of curb; Classen Boulevard from the north line of 16th St. to the north line of 37th st. be paved with a double drive way of 23 ft. from face of curb to face of curb, on each side of the Street car right of way including the full width of the street intersections; California Ave. from the east line of Dewey Ave. to the east line of Shartel Ave. be paved a total width — 40 ft. from face of curb to face of curb; 3rd St. from the west line of Lee Ave., to the east line of Carey and Weavers Addition, be paved a total width of 30 ft. and from the east line to the west line of said addition be paved a total width of 26 ft. from face of curb to face of curb, and Byers Ave., which is an irregular st. from the north line of 3rd st. to the south line of 4th st. be paved its total width from property line to property line; that in said notice it was also provided that each bid should be accompanied by certified check in the sum of 3 per cent of the amount, all of which check should be forfeited to the city in case the successful bidder failed to enter into a contract and give the required bond within the required time and said notice also advised prospective contractors that they would be required to

22 give a bond in the sum of 20 per cent of the contract price for the faithful performance of said work, and for the holding of the city harmless from any and all damages which might occur and such notice also provided that bids would be received for both a five year and a ten year guarantee and that the contractors would be required to give a bond in the sum of 10 per cent of the contract price as a guarantee of keeping the paving in a state of good repair for a period of five years if bids were accepted on the five year guarantee, and in a state of good repaid for a period of ten years, if bids were accepted on ten year guarantee. And said notice also priveded that the contractor should receive for the above work street improvement bonds at par value against the abutting property according to house bill 231 approved April 17th, 1908, and that no proposals would be considered on any street which failed to contain a bid upon every item in the estimate of the city engineer

for such street. And said notice also provided that the council reserved the right to reject any and all bids. Said notice so published as aforesaid was signed by George Hess the city clerk and attested with his official seal of office.

12. Your orator further alleges and shows to your Honors that said city clerk of the city of Oklahoma City pursuant to a resolution duly and regularly passed by the Mayor and City Council of the city of Oklahoma City on October the 19th, 1908, caused to be published in the "Oklahoma City Times" a notice asking for bids for the improvement of certain streets which notice was duly published in each issue of said paper from and including the 21st day of October, 1908, to and including the 31st day of October, 1908, and said notice also provided and advised prospective bidders that sealed bids would be received at the office of George Hess, the city clerk of said city of Oklahoma City up to 5 o'clock P. M. on November 2nd, 1908, and that such bids would be considered by the Mayor and City Council of said city at the council's chamber in the said city hall, at 8 o'clock P. M. on said date, for the paving of the following streets with asphalt in the said city of Oklahoma City, according to the plans and specifications then on file in the office of the said city clerk; that bids would be received on each street separately to-wit: Shartel Ave. from the north line of 16th St. following said avenue in a north and in a northwesterly direction to a point, at which the same intersects the west line of said avenue, where the same takes a due north course, be paved a total width of 50 ft. and from thence north to the south line of 19th St. a total width of 30 ft. from face of curb to face of curb; Walker Ave. from the north line of 4th St. to the south line of 6th St. paved a total width of 36 ft. from face

of curb to face of curb; Broadway from the north line of  
23 Washington Ave. to the south line of the east and west alley between Choctaw and Tean Aves. be paved a total width of 40 ft. from face of curb to face of curb; Lindsay Ave. from the north line of 4th St. to the south line of 5th St. be paved a total width of 30 ft. from face of curb to face of curb; and 3rd St. from west line of Robinson Ave. to the center line of Walker Ave. to the west line of Lee Ave., be paved a total width of 30 ft. from face of curb to face of curb, all of said streets being in the city of Oklahoma City, Oklahoma; that said notice also provided that each bid should be accompanied by certified check in the sum of 3 per cent of the amount bid and that such certified check should be forfeited to the city of Oklahoma City in case such successful bidder failed to enter into contract and give the required bond within the required time and said notice also provided that the contractor would be required to give a bond in the sum of 20 per cent of the contract price for the faithful performance of the work, and for the holding of the city harmless from any and all damages which might occur and such notice also provided that bids would be received for both five year and ten year guarantee and also that the contractor would be required to give a bond in the sum of 10 per cent of the contract price as a guarantee of keeping the pavement in a state of good repair for the period of five years if bids should be accepted on a five year guarantee, and in a state of good repair for a period of 10

years if bids should be accepted on the ten year guarantee; and said notice also provided that the contractor should receive for the work described therein street improvement bonds at par value against the abutting property according to House Bill 231, which was approved April 17th, 1908, and also that no proposals would be considered on any street which failed to contain a bid upon every item included in the estimate of the City Engineer for such street and said notice also provided that the city council reserve the right to reject any and all bids. Said notice so advertised was duly signed by George Hess, the city clerk and attested with his official seal.

13. Your orator further alleges and shows to your honors that pursuant to the resolutions of the city council of the city of Oklahoma City, plans, specifications, profiles and estimates prepared by the city engineer of the city of Oklahoma City, and duly filed as provided by law, and the notices published by the said city clerk of the said city of Oklahoma City pursuant to resolutions and directions of the city council of said city, your orator on November 2nd, 1908, filed with the city clerk certain proposals or bids for the paving of certain streets and for making of the improvements provided

for in said resolutions of the city council and as provided  
24 for in the plans, specifications, profiles and estimates prepared by the city engineer, and as provided for in the notices published by the city clerk; that each and all of said proposals offered unconditionally to pave the streets and make the improvements referred to therein unconditionally, pursuant to and in accordance with the requirements imposed and provided for by the resolutions of the city council, plans, profiles, specifications and estimates prepared by the city engineer and in accordance with the notices published by the said city clerk, which bids or proposals were for the paving of the streets and for the making of the improvements as follows to-wit: Your orator offered, proposed and agreed with the Honorable Mayor and City Council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Second St. from Western Ave. to Blackwelder Ave. in said city of Oklahoma City and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

	5 yrs.	10 yrs.
Sheet Asphalt pavement.....per sq. yd.	\$2.03	\$2.10
Earth Excavation .....per cu. yd.	.35	.35
Str. Concrete curb and gutter rad. 6"		
curb .....per lin. ft.	.75	.75
Rad. Concrete Curb & gutter atr. 6"		
curb .....per lin. ft.	.75	.75
Concrete double gutter.....per lin. ft.	.75	.75
3" Oak Header.....per lin. ft.	.15	.15
15 inch .....per lin. ft.	1.00	1.00
18 inch .....per lin. ft.	1.55	1.55
21 inch .....per lin. ft.	1.75	1.75
Manholes, complete .....Each	40.00	40.00
Catch basins .....Each	20.00	20.00

That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$740.00, as required by the resolutions, specifications, and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable Mayor and City Council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of

25 Second Street from Blackwelder Avenue to Ohio Avenue, in said city of Oklahoma City, and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . . per sq. yd.	\$2.03	\$2.10
Earth excavation . . . . . per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.75	.75
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.75	.75
Concrete double gutter . . . . . per lin. ft.	.75	.75
3" Oak header . . . . . per lin. ft.	.15	.15
Vit. pipe in place inc. backfill 10 inch . . per lin. ft.	.60	.60
Vit. Pipe in place Inc. Backfill 12 inch . . per lin. ft.	.80	.80
Vit. pipe in place, inc., backfill 10 inch . . per lin. ft.	.60	.60
12 inch . . . . . per lin. ft.	.80	.80
15 inch . . . . . per lin. ft.	1.00	1.00
18 inch . . . . . per lin. ft.	1.55	1.55
Manholes, complete . . . . . Each	40.00	40.00
Catch basins . . . . . Each	20.00	20.00

That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and [and] at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$710.00, as required by the resolutions, specifications, and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable Mayor and city council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Third Street from Lee Avenue to Carey and Weaver's Addition, in said city of Oklahoma City, and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . per sq. yd.	\$2.03	\$2.10
Earth excavation . . . . . per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.75	.75
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.75	.75
Concrete double gutter. . . . . per lin. ft.	.75	.75
3" Oak header. . . . . per lin. ft.	.15	.15

That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$76.00, as required by the resolutions, specifications and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable Mayor and city council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Fifth Street from Walker Avenue to Western Avenue, in said city of Oklahoma City and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . per sq. yd.	\$2.03	\$2.10
Earth excavation . . . . . per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.74	.74
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.74	.74
Concrete double gutter. . . . . per lin. ft.	.74	.74
3" Oak header. . . . . per lin. ft.	.15	.15
Vit. pipe in place, inc., backfill, 10 inch . . per lin. ft.	.60	.60
12 inch . . . . . per lin. ft.	.80	.80
15 inch . . . . . per lin. ft.	1.00	1.00
Manholes, complete . . . . . Each	40.00	40.00
Catch basins . . . . . Each	20.00	20.00

That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$767.00, as required by the resolutions, specifications and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable



Mayor and city council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Sixth Street from Robinson Avenue to Walker Avenue, in said city of Oklahoma City, and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

27

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . per sq. yd.	\$2.03	\$2.10
Earth excavation . . . . . per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.75	.75
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.75	.75
Resetting stone curb. . . . . per lin. ft.	.20	.20
Concrete double gutter. . . . . per lin. ft.	.75	.75
Concrete single gutter. . . . . per lin. ft.	.56	.56
3" Oak header. . . . . per lin. ft.	.15	.15
Vit. pipe in place, Inc., backfill 15 inch. . per lin. ft.	1.00	1.00

That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$350.00, as required by the resolutions, specifications and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable Mayor and city council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Sixth Street from Walker Avenue to Lee Avenue, in said city of Oklahoma City and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . per sq. yd.	\$2.03	\$2.10
Earth excavation . . . . . per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.74	.74
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.74	.74
Concrete double curb. . . . . per lin. ft.	.74	.74
3" Oak header. . . . . per lin. ft.	.15	.15
Vit. pipe in place, inc., backfill, 10 inch. . per lin. ft.	.60	.60
12 inch . . . . . per lin. ft.	.80	.80
Manholes, complete . . . . . Each	40.00	40.00
Catch basins . . . . . Each	20.00	20.00



That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$240.00, as required by the resolutions, specifications and notices aforesaid. Said proposal was duly signed by the complainant herein.

28 Your orator also offered, proposed and agreed with the Honorable Mayor and City Council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Sixth Street from Phillips Avenue to Kelley Avenue, in said city of Oklahoma City, and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . per sq. yd.	\$2.03	\$2.10
Earth excavation . . . . . per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.74	.74
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.74	.74
Concrete double gutter . . . . . per lin. ft.	.74	.74
3" Oak header . . . . . per lin. ft.	.15	.15
Vit. pipe in place, inc., backfill, 10 inch . . per lin. ft.	.60	.60
12 inch . . . . . per lin. ft.	.80	.80
15 inch . . . . . per lin. ft.	1.00	1.00
Manholes, complete . . . . . Each	40.00	40.00
Catch basins . . . . . Each	20.00	20.00

That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$300.00, as required by the resolutions, specifications and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable Mayor and city council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Seventh Street from Stiles Avenue to Stonewall Avenue, in said city of Oklahoma City, and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

29

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . per sq. yd.	\$2.02	\$2.09
Earth excavation . . . . . per cu. yd.	.35	.35
Rock excavation . . . . . per cu. yd.	.70	.70
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.74	.74
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.74	.74
Concrete double gutter . . . . . per lin. ft.	.74	.74
3" Oak header . . . . . per lin. ft.	.15	.15
Vit. pipe in place, inc., backfill, 10 inch . . per lin. ft.	.60	.60
12 inch . . . . . per lin. ft.	.80	.80
15 inch . . . . . per lin. ft.	1.00	1.00
18 inch . . . . . per lin. ft.	1.55	1.55
Manholes, complete . . . . . Each	40.00	40.00
Catch basins . . . . . Each	20.00	20.00

That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$1,000.00, as required by the resolutions, specifications and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable Mayor and city council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Ninth Street from Dewey Avenue to Shartel Avenue, in said City of Oklahoma City, and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . per sq. yd.	\$2.02	\$2.09
Earth excavation . . . . . per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.74	.74
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.74	.74
Concrete double gutter . . . . . per lin. ft.	.74	.74
Concrete single gutter . . . . . per lin. ft.	. . . .	. . . .
3" Oak header . . . . . per lin. ft.	.15	.15
Vit. pipe in place, inc., backfill 10 inch . . per lin. ft.	.60	.60
15 inch . . . . . per lin. ft.	1.00	1.00
Manholes, complete . . . . . Each	40.00	-0.00
Catch basins . . . . . Each	20.00	20.00

That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and 30 at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City his certified check for the sum of \$265.00, as required by the resolutions, specifications and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable Mayor and City Council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Sixteenth Street from Shartel Avenue to McKinley Avenue, in said city of Oklahoma City, and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . per sq. yd.	\$2.02	\$2.09
Earth excavation . . . . . per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.74	.74
Rad. concrete curb and gutter str. 6"		
curb . . . . . per lin. ft.	.74	.74
Concrete double gutter . . . . . per lin. ft.	.74	.74
3" Oak header . . . . . per lin. ft.	.15	.15
Vit. pipe in place, inc. backfill 10 inch . . per lin. ft.	.60	.60
12 inch . . . . . per lin. ft.	.80	.80
15 inch . . . . . per lin. ft.	1.00	1.00
Manholes, complete . . . . . Each	40.00	40.00
Catch basins . . . . . Each	20.00	20.00

That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$845.00, as required by the resolutions, specifications, and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable Mayor and City Council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Nineteenth Street from Dewey Avenue to Western Ave., in said city of Oklahoma City, and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

31

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . . per sq. yd.	\$2.02	\$2.09
Earth excavation . . . . . per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.74	.74
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.74	.74
Concrete double gutter. . . . . per lin. ft.	.74	.74
3" Oak header. . . . . per lin. ft.	.15	.15
Vit. pipe in place, inc., backfill 10 inch . . per lin. ft.	.60	.60
12 inch . . . . . per lin. ft.	.80	.80
15 inch . . . . . per lin. ft.	1.00	1.00
24 inch . . . . . per lin. ft.	2.30	2.30
27 inch . . . . . per lin. ft.	2.60	2.60
Manholes, complete . . . . . Each	40.00	40.00
Catch basins . . . . . Each	20.00	20.00

That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$4,438.00, as required by the resolutions, specifications and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable Mayor and City Council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Sixteenth Street from Shartel Avenue to McKinley Avenue, in said city of Oklahoma City, and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . . per sq. yd.	\$2.14	\$2.19
Earth excavation . . . . . per cu. yd.	.35	.35
Rock Excavation . . . . . per cu. yd.	.70	.70
Embankment . . . . . per cu. yd.	.20	.20
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.85	.85
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.90	.90
Str. concrete curb and gutter, 4" curb. . . per lin. ft.	.80	.80
Rad. concrete curb and gutter, 4" curb. . per lin. ft.	.85	.85
Resetting stone curb. . . . .		
Concrete double gutter. . . . . per lin. ft.	.90	.90
3" Oak header. . . . . per lin. ft.	.15	.15
Vit. pipe in place, inc., backfill, 10 inch . per lin. ft.	.60	.60

10 inch .....	per lin. ft.	.60	.60
12 inch .....	per lin. ft.	.80	.80
15 inch .....	per lin. ft.	1.00	1.00
18 inch .....	per lin. ft.	1.55	1.55
21 inch .....	per lin. ft.	1.75	1.75
24 inch .....	per lin. ft.	2.30	2.30
Manholes, complete .....	Each	40.00	40.00
Catch basins .....	Each	20.00	20.00

32 That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$4,438.00, as required by the resolutions, specifications and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable Mayor and City Council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of California Avenue from Shartel Avenue to Western Avenue, in said city of Oklahoma City, and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

		5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch			
Portland cement concrete foundation ..	per sq. yd.	\$2.03	\$2.10
Earth excavation .....	per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"			
curb .....	per lin. ft.	.74	.74
Rad. concrete curb and gutter str. 6"			
curb .....	per lin. ft.	.74	.74
Resetting stone curb .....	per lin. ft.	.20	.20
Concrete double gutter .....	per lin. ft.	.74	.74
Concrete single gutter .....	per lin. ft.	.56	.56
3" Oak header .....	per lin. ft.	.15	.15
Vit. pipe in place, inc., backfill, 10 inch ..	per lin. ft.	.60	.60
12 inch .....	per lin. ft.	.80	.80
Manholes, complete .....	Each	40.00	40.00
Catch basins .....	Each	20.00	20.00

That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$363.00, as required by the resolutions, specifications and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable

Mayor and City Council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Eighteenth Street from Dewey Avenue to Shartel Avenue, of Dewey Avenue from Seventeenth Street to Nineteenth street, and of Lee Avenue from Seventeenth Street to Nineteenth Street, in said city of Oklahoma City, and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . per sq. yd.	\$2.02	\$2.09
Earth excavation . . . . . per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.74	.74
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.74	.74
Concrete double gutter. . . . . per lin. ft.	.74	.74
3" Oak header. . . . . per lin. ft.	.15	.15
Vit. pipe in place, inc., backfill, 10 inch. . per lin. ft.	.60	.60
12 inch . . . . . per lin. ft.	.80	.80
21 inch . . . . . per lin. ft.	1.75	1.75
24 inch . . . . . per lin. ft.	2.30	2.30
Manholes, complete . . . . . Each	40.00	40.00
Catch basins . . . . . Each	20.00	20.00

That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$620.00, as required by the resolutions, specifications and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable Mayor and City Council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Walker Avenue from Thirteenth Street to Sixteenth Street, in said city of Oklahoma City, and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . per sq. yd.	\$2.02	\$2.09
Earth excavation . . . . . per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.70	.70
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.90	.90
Concrete double gutter. . . . . per lin. ft.	.70	.70
3" Oak header. . . . . per lin. ft.	.15	.15
Vit. pipe in place, inc., backfill. . . . .	----	----



That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at 34 the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City his certified check for the sum of \$273.00, as required by the resolutions, specifications and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable Mayor and City Council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Washington Avenue from Broadway Avenue to Robinson Avenue, in said city of Oklahoma City, and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . per sq. yd.	\$2.03	\$2.10
Earth excavation . . . . . per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.75	.75
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.75	.75
Concrete double gutter. . . . . per lin. ft.	.75	.75
3" Oak header. . . . . per lin. ft.	.15	.15

That your orator further agreed in said proposal to commence work within — days after signing the contract and to complete same within six months after commencement thereof, and at the time of filing said proposal or bid your orator also filed therewith with the city clerk of the city of Oklahoma City, his certified check for the sum of \$102.00, as required by the resolutions, specifications and notices aforesaid. Said proposal was duly signed by the complainant herein.

Your orator also offered, proposed and agreed with the Honorable Mayor and City Council of the city of Oklahoma City in a certain proposal, dated Oklahoma City, November 2nd, 1908, to furnish all the necessary tools, labor and material for the paving of Washington Avenue from Robinson Avenue to Walker Avenue, in said city of Oklahoma City and to perform the work in the manner and under the conditions required by the specifications therefor, at the following named prices, to-wit:

	5 yrs.	10 yrs.
Sheet asphalt pavement, inc. 5 inch		
Portland cement concrete foundation . . per sq. yd.	\$2.03	\$2.10
Earth excavation . . . . . per cu. yd.	.35	.35
Str. concrete curb and gutter rad. 6"		
curb . . . . . per lin. ft.	.75	.75
Rad. concrete curb and gutter atr. 6"		
curb . . . . . per lin. ft.	.75	.75
Concrete double gutter. . . . . per lin. ft.	.75	.75
3" Oak header. . . . . per lin. ft.	.15	.15
Vit. pipe in place, inc. backfill 10 inch . . per lin. ft.	.25	.25

the city engineer, the resolutions of the Mayor and city council referred to in the notices published by the city clerk and the proposals filed by this complainant; and your orator further alleges and shows that every detail for the paving of said streets and the making of said improvements are provided for in the plans, specifications, profiles and estimates of the city engineer, resolutions of the city council of Oklahoma City, the notices published by the city clerk of said city, the proposals filed by the complainant herein and the acceptance of such proposals and the awarding of the contract for such improvements by the said Mayor and city council to this complainant; and that when the said Mayor and city council of said city awarded the contracts to the complainant for the making of said improvements, the city of Oklahoma City thereby completely entered into contracts with the complainant for the making of said improvements; that this complainant by reason of said contracts has a vested right of property in the same for the making of said improvements and is entitled to be permitted to perform the terms and conditions of his said contracts and to make said improvements under the terms and conditions thereof.

14. Your orator further alleges and shows to your honors that after said Mayor and city council of said city of Oklahoma City had awarded the contracts for the making of said improvements to this complainant, it attempted by resolution or motion to reconsider its action in awarding such contracts for the making of the improvements referred to in the proposals of complainant, in the resolutions of the city council and in the plans, specifications and estimates of the City Engineer and attempted to set aside the award made to this complainant, in violation of the rights of this complainant; that the action of the said mayor and city council of the said city of Oklahoma City in attempting to set aside its contracts and awards to this complainant, was evidenced by motions and resolutions spread upon the records of said city in the office of the city clerk thereof.

15. Your orator further alleges and shows to your Honors that within the time provided for by the resolutions, plans, specifications, and notices referred to in this bill in equity, this complainant, after the awards were made to him for the making of the improvements and the paving of the streets upon his bids referred to in this bill in equity, filed his bonds with the city clerk for the approval of the Mayor of said city, for the faithful performance of said work, and which bonds were each and all for the sum required by the city in its said plans, specifications and notices; and were each and all in due form, but that the city of Oklahoma City, through its acting Mayor, refused to approve any of said bonds, and the only reason assigned therefor was that the city (although it had awarded contracts for making improvements referred to in the bids above described), had a right to set aside such awards and the right to refuse to permit your orator to make said improvements. And your orator also represents and shows that the sureties who signed such bonds on his behalf were fully able financially to respond in damages and pay the same should they be required so to do.

16. Your orator further alleges and shows to your Honors that within the time provided for in the resolutions of the city council, the plans and specifications of the city engineer, and the notices published by the City Clerk, *be* tendered to the Acting Mayor of the city of Oklahoma City, and to the city council, formal written contracts, which embodied the contracts made by the said city and this complainant for the making of the improvements aforesaid, and requested the said acting Mayor and the said city council to execute the same, and also offered at the same time to make any changes in said contracts to conform to the agreement as evidenced by the resolutions of the city council, the plans and specifications of the city engineer and the notices published by the city clerk, and the bids or proposals filed by this complainant, should it be found that said formal written contracts did not correctly state the said contract, but that said Mayor and City Council wholly failed and neglected to sign the same, although said contracts were each signed in due form, and said defendant city of Oklahoma City, and its officers have wholly neglected, failed and refused to carry out its said contracts, with this complainant, and have neglected, failed and refused to permit him to make said improvements under his said contracts, although said complainant through one of his attorneys,

B. F. Burwell, of the firm of Burwell, Crockett & Johnson,

39 demanded of said Mayor and city council on the 11th day of November, 1908, that the said city execute said formal written contracts and approve the bonds of this complainant referred to in this bill in equity. And your orator alleges and shows to your Honors that he has done and performed all of the matters and things required of him on his part, under the terms and conditions of his said contracts, and has offered to do and perform any and all matters and things necessary to make said improvements but that the said city of Oklahoma City, and its officers named as defendants in this case, have wholly neglected, failed and refused to carry out and perform the terms and conditions of said contracts with reference to said improvements although requested so to do. And your orator further alleges and shows to your honors that prior to the time that the Mayor and city council of the said city of Oklahoma City, on November 11th, 1908, attempted to set aside and vacate the awards made to this complainant for the improvements referred to in this bill in equity, this complainant had commenced work under the said contracts and had done some grading on some of the streets for the paving of which awards had been made to this complainant as alleged in this bill in equity.

And your orator also alleges and shows to your honors that after said contracts for the making of said improvements were awarded to this complainant, he arranged and contracted for the Portland cement to be used in making said improvements and for the stone-dust which is also a material necessary in making such improvements; and that the materials so arranged and contracted for amounted to about \$38,000.00 and that the complainant had arranged for said materials prior to the time that the Mayor and city

council attempted to revoke and set aside the awards to him on November 11, 1908.

17. Your orator further alleges and shows to your Honors that he has been advised by counsel and believes the fact to be that he has a valid and subsisting contract with the said city of Oklahoma City for the making of the improvements, referred to in this bill in equity, and that the attempt on the part of the said city of Oklahoma City to vacate and set aside the award to this complainant for said improvements was and is illegal, and void; that this bill is filed for the purpose of avoiding a multiplicity of suits and because the complainant has no other adequate remedy at law, and that should he be denied relief in this action, he will suffer great and irreparable injury and loss; that under the terms and conditions written in the plans and specifications for the making of the improvements herein, it is provided and agreed that; "The doing of the work em-

40       braced in the contract shall not render the city liable to pay directly or indirectly for said work or any part thereof, otherwise than by levy or special assessment, and issuance of certificates against the lots, tracts and parcels of land liable to be charged therefor, as provided by law and that said contractor shall be without recourse or liability against the city of Oklahoma City in any event". And the complainant has been advised by counsel that said provision written in said plans and specifications is a valid and binding provision thereof.

18. Your orator further represents, alleges and shows to your Honors that the said Mayor and said city council of Oklahoma City will, unless prevented by an order and judgment of this court, deprive this complainant of the privilege of making the improvements referred to in this bill in equity, and prevent him from — the profits of his said contracts, and your orator alleges and shows to your Honors that the profits of said contracts awarded to this complainant would amount to at least \$45,000.00; and complainant stands ready, willing and able to carry out his said contracts for said improvements and will do so if afforded an opportunity; that the attempt on the part of the said Mayor and city council of the said city of Oklahoma City to set aside the awards of said contracts to this complainant is in violation of the constitution of the United States and in violation of the constitution and laws of the State of Oklahoma, and is an attempt to deprive this complainant of property without due process of law; that the said Mayor and city council of the said city of Oklahoma City have not authority in law or in equity to take said contracts for the making of said improvements away from this complainant but said attempt on the part of the said Mayor and city council of said city of Oklahoma City is in direct violation of law, of equity and fair dealing.

19. Your orator further alleges and shows to your Honors that under the paving laws of the State of Oklahoma, the expenses of paving the public streets of cities is taxed to the property owners in front of whose property the paving is laid and improvements made; that the city of Oklahoma City is not liable for the cost of such paving but under the laws of the Law of State of Oklahoma, said city

of Oklahoma City is charged with the duty of letting contracts for such improvements; that the Mayor and city council of the city of Oklahoma City have only the authority to let the contracts for the improvements referred to in this bill, but have no authority whatever to set aside a contract or award when made for paving nor has said city of Oklahoma City nor the Mayor or city council thereof

any legal authority or right to refuse to carry out the contracts or awards made to this complainant. And complainant further alleges and shows to your honors that he has, in all matters and things acted fairly and honestly in the obtaining of said contracts and that no cause or reason exists in law or equity for the refusal of the defendants to carry out and perform their said contracts in this matter.

20. Your orator further alleges and shows to your honors that the certified checks which he deposited with the city of Oklahoma City at the time he filed the proposals or bids for the furnishing materials, labor, tools and the making of the improvements involved in this action, are still held by the city of Oklahoma City and have not been taken down by this complainant.

21. Your orator further represents and shows that under the rules, regulations and custom of the said city of Oklahoma City, it is not customary nor are contractors for the making of public improvements such as involved in this action, required to give a maintenance bond until the work or improvement is completed but your orator stands ready, and willing to execute said bond at such time and in such amount *at* may be required by the contract between himself and the said city of Oklahoma City for the making of said improvements; and that he hereby consents that any provision be written therein, and such penalties imposed as are contemplated by said contract between the said city of Oklahoma City and himself.

22. Your orator further represents and shows to your honors that in executing his said bonds for the making of the improvements and in executing formal written contracts subsequent to the awarding of the improvements and contracts to him by the Mayor and city council, of the said city of Oklahoma City, he used printed forms required by said city of Oklahoma City in such matters.

23. Your orator further alleges and shows to your honors that the said city of Oklahoma City and its officers who are named as defendants in this case are threatening to and will, unless restrained and enjoined by an order of the above entitled court, or one of the judges thereof, proceed to cause the improvements referred to in this bill, and for the making of which this complainant alleges he has valid and subsisting contracts, to be made, and permit said improvements to be made by other persons, who will reap the fruits and profits of said improvements, and will issue certificates for such improvements to other persons and thereby make it impossible, even should this complainant secure a judgment in this court for specific performance to carry out his said contracts with the said city of Oklahoma City in making said improvements.

42 Wherefore, and for as much as your orator is remediless in the premises under and by the strict rules of the common

law, and can only have relief in court of equity, where matters of this nature are properly recognizable and reviewable, it files this its bill of complaint, and prays, the premises considered, that it be adjudged, and decreed by this Honorable Court:

First. That the defendant, the city of Oklahoma City, Henry M. Scales as Mayor of said city of Oklahoma City; that George Hess as clerk of the said city of Oklahoma City; that W. C. Burke as city engineer of said city of Oklahoma City; that Mont F. Highley as President of the city council of the said city of Oklahoma City and that also said Mont F. Highley, A. S. McWilliams, W. T. Corder, O. P. Wortman, L. L. Land, M. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers, and R. F. Helm, as councilmen of said city of Oklahoma City, and each and all of said defendants be required by a judgment and decree of this court to specifically perform the contracts entered into between the said city of Oklahoma City, and this complainant for the making of the improvements described in the resolutions, plans and specifications; notices and referred to in this bill of complaint; that said city of Oklahoma City and each of said other defendants named in this bill be required to do and perform each and all of the acts and matters and things required of them under the terms of the contracts entered into between this complainant and said city of Oklahoma City as evidenced by the resolutions of the city council of said city of Oklahoma City, the plans, profiles, specifications and estimates prepared by the said city Engineer, the notices published by the said city clerk, the bids or proposals filed by this complainant and the acceptance [*or*] said bids and the awarding of the contracts for said improvements made by the Mayor and city council as detailed in this bill of complaint; which streets to be improved and included in said contracts between this complainant, and the said city of Oklahoma City are as follows to-wit:

Second St. from east line Blackwelder to East line Ohio Ave.

Second St. from west line of Western Ave. to east line of Blackwelder.

Third St. from west line of Lee Ave. to west line of Carey and Weaver's Addition.

Fifth St. from west line of Walker Ave. to east line of Western Ave.

Sixth St. from east line of Walker Ave. to east line of Lee Ave.

43 Sixth St. from west line of Phillips to the West line of Kelley Ave.

Seventh St. from east line of Stiles Ave. to the west line of Stonewall Ave.

Ninth St. from east line of Dewey Ave. to the east line of Shartel —.

Sixteenth St. from east line of Shartel Ave. to the East line of McKinley Ave.

Nineteenth St. from east line of Dewey Ave. to the east line of Western Ave.



Classen Boulevard from the North line of 16th St. to the north line of 37th St.

California Ave. from the east line of Shartel — to the east line of Western Ave.

Eighteenth St. from the west line of Dewey Ave. to the east line of Shartel Ave. and Dewey Ave. from the North line of 17th St. to the south line of 19th St. and Lee Ave. from the north line of 17th St. to [to] the south line of 19th St.

Walker Ave. from north line of 13th St. to the north line of 16th St.

Washington Ave. from the west line of Broadway to the east line of Robinson —.

Washington Ave. from the west line of Robinson to the east line of Walker Ave.

Phillips Ave. from the north line of 4th st. to the north line of 10th St.

And this complainant here offers to do and perform any and all matters and things which may be required of him by the terms of said contracts or by the order of decree of this court; and that for purposes aforesaid all proper directions may be given and inquiries made.

Second. Your orator further prays that writ of injunction be made pending this suit according to the course and practice of this court, out of and under the seal of this Honorable Court by one of Your Honors according to the Statute in such case made and provided, directing and commanding, enjoining and restraining the said defendant, the city of Oklahoma City, and each of the other defendants, and any and all persons whomsoever from interfering with this complainant in carrying out and performing the terms and conditions of his contracts for the making of said improvements, for which contracts have been awarded to this complainant and that said defendant and each of them be also enjoined from making said improvements themselves, and from permitting any

44 one else to make them, other than this complainant and complainant any grade stakes, data, profiles, specifications to aid them in making said improvements and from doing or performing any act which will prevent this complainant from making said improvements or hinder or obstruct him in making the same; and that said order of injunction be so framed and worded as to extend to and be binding upon said defendants and each of them, their agents, employees and representatives. And that said defendants, and each of them, their agents, employees, be also enjoined from levying any special assessment and from issuing any certificates against the lots, tracts and parcels of land to be charged for said improvements to any corporation, firm, person or persons whomsoever, except for the use and benefit of the complainant herein.

Third. Your orator further prays that your Honors may grant unto your orator a writ of subpoena of the United States of America, issued out of and under seal of this Honorable court, directed to each of the defendants named in this bill of complaint therein, and thereby command said defendants and each of — at a certain time

and under a certain penalty therein to be named personally, to be and appear before this Honorable Court; then and there to answer all and singular under oath, the matters aforesaid and to stand and abide by and sustain such direction and decree as shall be made herein as to your Honors shall seem equitable and just.

Fourth. Your orator also prays for such further relief in the premises as the nature and circumstances of this case may require as to this Honorable Court may seem meet and right. And your orator is in duty bound and will forever pray.

DAVID M. McCORMICK,  
By BURWELL, CROCKETT & JOHNSON,  
*His Solicitors and Attorneys.*

United States of America, Western District of the State of  
Oklahoma.

STATE OF OKLAHOMA,  
*Oklahoma County, ss:*

David McCormick, being duly sworn says that he is the complainant in the foregoing bill of complaint; that he has read the foregoing bill of complaint, and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true. And further affirmeth not.

DAVID McCORMICK.

45       Subscribed and sworn to before me, the undersigned,  
          authority on this the 29th day of January, A. D. 1909.

[SEAL.]

EDITH E. LOOMIS,  
*Notary Public.*

My commission expires Feb. 5, 1912.

Ex. "A."

Lee Van Winkle, Mayor. W. C. Burke, City Engineer.

*General Specifications for Paving and Curbing Oklahoma City, O. T.*

*General Specifications for Paving and Curbing Oklahoma City,  
Oklahoma Territory.*

*Rules Governing the Form of Making Estimates, Issuing Certifi-  
cates, etc.*

When the work of paving on any street contracted for is completed the City Engineer shall carefully measure and determine the quantity of each class of work done on which separate prices are fixed and compute the cost thereof according to the terms of the contract. And the aggregate price of the work done and material

furnished on said street, less any and all deductions which may be made therefor, in accordance with the terms of this contract, shall in the event of the faithful performance and acceptance of the work done on said street, constitute the amount due under this contract for the work done on said street, and this sum the City agrees to levy and collect as a special tax, according to law. And the Mayor and Council of said City, upon the completion and acceptance of the work to be done under contract on any street, shall cause a certificate to be issued against all of the lots, pieces or parcels of ground liable to taxation to pay the cost of the work on the said street, or all unpaid assessments against same according to law.

The certificates so issued are payable in ten equal annual installments, with interest at the rate of 7 per cent per annum.

#### Special Assessments.

In accordance with Ordinance No. 328, the City Engineer is authorized to collect a cash fee of  $2\frac{1}{2}$  per cent of the total amount estimated on the public improvements to be contracted for, by or in the City of Oklahoma City. The contractors are requested  
46 to familiarize themselves with the terms embodied in Ordinance No. 328 and be governed accordingly.

#### Definitions.

The term "grade" used in these specifications is understood to refer to, and indicate the legally established grade of the street.

The word "Contractor" wherever used, means the first party to this agreement, or his legal representative, and the word "Engineer" referred to is the person holding the office of City Engineer of Oklahoma City for the time being, or to his properly authorized agents, limited to the particular duties entrusted to them.

#### Protection of Work.

Such precautions as the Engineer and Construction Committee may deem necessary to prevent damage to the subgrade, foundation or wearing surface shall be taken by the Contractor at his own expense.

Should any portion of the work become damaged by action of the elements, by teaming over it — by any cause whatever, any such injury that may occur shall be made good by the Contractor to the satisfaction of the Engineer and Construction Committee before the acceptance of the work.

#### General Stipulations.

It is further agreed between the parties hereto that this contract is made subject to the conditions and stipulations which follow.

The first party shall not assign or transfer this contract, nor sublet any part of the work embraced in it without the written consent of the Engineer.

The first party shall commence work at such points as the Engineer and Construction Committee may direct, and shall conform to their directions as to the order in which the different parts of the work shall be done, as well as to all their other instructions as to the mode of doing the same.

Whenever the Contractor is not present on the work orders will be given to the Superintendent or Foreman in immediate charge thereof, and shall by them be received and obeyed; and if any person employed on the work shall refuse or neglect to obey the orders of the Engineer or Construction Committee, or shall appear to the Engineer to be incompetent, disorderly or unfaithful, he shall, upon the requisition of the Engineer or Construction Committee, be at once discharged, and not again employed upon any part of the work.

Any work not herein specified, which may be fairly implied as included in this contract, of which the Engineer and Construction Committee shall be the judge, shall be done by the  
47 first party without charge.

The first party shall also do such extra work in connection with this contract as the Engineer or Construction Committee may specially direct, and if it shall be a kind for which no price is stated in this contract, such price shall be fixed by the Engineer and Construction Committee, but no claim for extra work shall be allowed, unless the same was done in pursuance of special orders as aforesaid and the claims presented as soon as practicable after the work is done, and before final estimate.

The first party, upon being so directed by the Engineer and Construction Committee, shall remove, rebuild and make good at his own cost any work which the latter shall decide to be defective, and any omission to condemn any work at the time of its construction, shall not be construed as an acceptance of any defective work, but the first party shall correct any imperfect work, whenever discovered before final acceptance of the work.

The said first party agrees to commence the work embraced in this contract within -- days after signing same and to prosecute said work regularly and uninterruptedly thereafter (unless the Engineer and Construction Committee may specially direct otherwise in writing), with such force as to insure its completion within -- days after commencement; the time of beginning, rate of progress and the time of completion being essential conditions of this contract. And if the Contractor shall fail to complete the work within the time above specified, an amount equal to the sum of \$10.00 per day for each and every day thereafter until the completion of said work, shall be deducted as liquidated damages for such breach of contract, from the amount of the final estimate of the work.

The days of work lost on this contract in consequence of injunction or Court proceedings, bad weather, or work being done by other contractors, corporations or individuals over whom the party of the first part has no control, organized strikes, or destruction by fire or otherwise, of any plant where material for this contract is manufactured or made, shall be added to the number of days specified in contract, within which such work was to be completed.

If in the opinion of the Engineer and Construction Committee, the first party, at any time during the progress of the work is not prosecuting said work with sufficient force to insure its completion within the time specified in this contract, they may notify said first party to employ such additional force as they may deem necessary, and upon the failure of said party to comply with such notice

48 within three days from date of such order, the Engineer or Construction Committee may put on such additional force at the cost of said party or they may at their option declare the contract annulled, but said declaration must be confirmed and ratified by ordinance before having any force or effect.

And the power is reserved by the Engineer and Construction Committee of the City of Oklahoma City to suspend or annul this contract or to suspend the doing of any work thereunder, at any time, for any failure on the part of the party of the first part to fulfill the same or for good cause, and any action of the City Engineer and Construction Committee in suspending or annulling this contract or suspending the doing of any work thereunder, and their decision as to the existence of such cause or reason for such annulment or suspension shall be conclusive as to the existence of such cause or reason in any controversy or litigation between the parties hereto, or others claiming under them. And if this contract cannot be so suspended or annulled, said first party shall not be entitled to anything on account of damages thereby, nor shall such annulment or suspension in any wise affect the right of said Oklahoma City to damages and penalties claimed by it on account of the failure of said first party, but said abatement or suspension or annulment must be satisfied by ordinance before having any force or effect.

The first party will be required to observe all City Ordinances in relation to the obstructing of any street, maintaining signals, keeping open passageway and protecting same where exposed, and generally obeying all laws and ordinances controlling or limiting those engaged on the work, and the said first party binds itself to indemnify and save harmless the City of Oklahoma City from all suits or actions of every name and description brought against said City, for or on account of any injuries or damages received or sustained by any party or parties, by or from the acts of said Contractor or his servants or agents in doing any of the work herein contracted for, or by or in consequence of any negligence in guarding the same or any improper material used in its construction, or by or on account of any act or omission of said first party, his servants or agents. When required by the Engineer or Construction Committee, the Contractor shall during the progress of the work, maintain a good passable sidewalk at least six (6) feet wide next to the street line or elsewhere, as may be indicated. Also shall put down and maintain suitable temporary cross-walks at the street intersections.

The materials to be used for the work contemplated in this contract shall be subject to the inspection of the Engineer or his representative, and only such materials may be used on the work as are in their opinion of suitable quality. All condemned material must

49 be immediately removed from the vicinity of the work. The workmanship shall also be approved by the Engineer or his representative. Failure or neglect on the part of the Engi-

neer or Construction Committee, or their authorized agents, to condemn or reject bad or inferior work or material shall not be construed to imply an acceptance of any work. Any work herein specified to be done is not to be regarded as accepted by the Engineer or Construction Committee until the issuing of certificates for same. The contractor shall protect from damage all water and gas pipes, hydrants and lamp posts, and reset to proper line and grade, and repair any sidewalks or curb that may become damaged or displaced at any time during the progress of the work, and shall notify the Chief of the Fire Department when a crossing is closed, and shall keep all street crossings so that the fire apparatus can cross in case of a fire emergency, and shall not obstruct access to fire hydrants. Upon completion of each block in length, of the work herein contemplated, the Contractor shall immediately remove all materials, earth, stone and rubbish of any kind from the street and any damage or injury to private or public property along the streets, by the Contractor shall be made good by him before the acceptance of the work.

The first party further agrees that he will pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work and all materials used therein.

It is further agreed that the doing of the work embraced in this contract shall not render the City liable to pay, directly or indirectly, for such work or any part thereof, otherwise than by levy or special assessment, and issuance of certificates against the lots, tracts and parcels of land liable to be charged therefor as provided by law, but without recourse or liability against the City of Oklahoma City in any event.

To prevent any disputes and litigation, it is further agreed by the parties hereto that the Engineer and Construction Committee shall in all cases determine the amount and quality of the several kinds of work which are to be paid for under this contract; and they shall decide all questions which may arise relative to the execution of this contract, on the part of the Contractor, and their estimate and decision shall be final and conclusive.

#### **Plans.**

The plans and specifications on file at the office of the City Clerk, relative to the work contemplated, and all plans which may be made by the Engineer subsequent to the date of contract of an explanatory nature thereto, are understood to form a part of these plans and specifications.

#### **Stakes.**

All work will be staked out by the City Engineer or his representatives, and the Contractor will be required to carefully preserve all stakes undisturbed, until they are no longer needed as guides for the workmen.



### Preparation for Subgrade.

The surface of the roadbed to be paved, as indicated on the plans, shall be excavated or filled to such depths as hereinafter specified, and made parallel with the established grade and general cross-section of the street, as shown on the plans, except at street and alley intersections, or at such points where there may exist a difference in the level between the street railway tracks and the curb, or between the curbs themselves, where the excavation shall be increased or decreased within a range of six (6) inches, as the Engineer may direct, to insure the proper drainage of the finished pavement. The entire roadway from gutter to gutter, after being perfectly dressed, shall be thoroughly rolled with not less than a five-ton-roller, and all depressions which shall then appear are to be filled with the same class of material as the roadbed and sprinkled with water, if required, and rolled until the whole shall be uniform and compact.

### Rolling.

The rolling for foundations and paving shall be done from the side towards the center, the roller moving lengthwise on the roadbed, unless otherwise ordered in writing by the Engineer.

### Haul.

All earth excavated from the roadbed shall be delivered to any place the Engineer or Construction Committee may direct, and be deposited as they may prescribe. When the earth is hauled a distance in excess of 1,000 feet the Contractor shall be allowed one (1) cent per cubic yard for each yard hauled; for each 100 feet over and above the first 1,000 feet, it being understood that in all cases the free haul shall be 1,000 feet.

### General Specifications for Concrete.

Concrete shall be composed of one (1) part of Portland cement of approved quality, three parts clean, sharp river sand, free from all dirt and foreign substances, and six (6) parts of broken limestone or granite. The cement shall be stored in some suitable place by the Contractor, so as to admit of proper testing and branding by the Engineer or Construction Committee for at least ten days prior to being used.

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### Cement.

All cement shall be of the best quality of Portland cement, and shall fulfill the following requirements: Not less than 85 per cent shall pass a sieve of 10,000 meshes per square inch; briquettes made from neat cement, after being kept in air under a wet cloth for twenty-four (24) hours, and the balance of the time in water, shall develop a tensile strength of 575 pounds per square inch in seven

days, or 640 pounds in twenty-eight (28) days. Any cement not showing an increase in tensile strength between the seventh and twenty-eighth day test shall be rejected.

It shall be the duty of the Inspector appointed by the City Engineer to keep an accurate account of the cement used, and the square yard of pavement or foundation laid each day, and send his report to the Engineer daily. The Contractor shall furnish the Inspector with a ticket for each load of cement brought to the work, and the ticket must state the number of barrels and kind of cement in the load.

The City shall have the right to employ any person or persons necessary to carry the cement or pour the same upon the sand in the boxes, previous to the mixing of the concrete. And said City employee shall be placed under a bond in the sum of \$2,000 and shall receive a salary of not exceeding two dollars (2.00) per day, said salary to be paid by the Contractor. It shall be his duty to see that the cement runs uniformly, and that the proper amount is placed on each batch of concrete. The City may appoint as many persons to carry cement as may seem advisable by the Engineer, but in no case shall the City appoint more than one man to three boxes. The cement carrier shall at no time have to carry cement more than forty (40) feet.

#### Sand.

The sand shall be clean, sharp, river sand, free from all dirt and foreign or vegetable matter.

#### Broken Stone.

The broken stone shall be broken limestone or granite, and shall be clean and tough. It shall be washed when necessary, to remove clay and dirt, and shall be broken sufficiently small to pass freely through a two and one-half ( $2\frac{1}{2}$ ) inch ring, and shall not be less than one-half ( $\frac{1}{2}$ ) inch in smallest dimensions.

#### Mixing Concrete.

The operation of mixing concrete shall be performed as follows: The sand shall be evenly spread over the entire surface of the mixing box, and the cement shall then be added and spread in like manner over the sand, covering it all to a uniform depth.

52 The two shall then be thoroughly mixed dry, with shovel or hoe; the whole mass to be thoroughly turned at least three times in the most approved manner. After the cement and sand have been thoroughly mixed to the satisfaction of the Inspector, sufficient water shall be added so that when worked it shall be a stiff mortar. The mortar shall then be spread entirely over the box, and the broken stone added and spread in like manner. The entire mass shall then be thoroughly mixed with the shovel until all the faces of the stone are brought in contact with the mortar, and the mortar evenly mixed throughout the

mass. In this last operation all portions of the concrete shall be raised at least three times on the shovel, turned and scattered in the most approved manner. The stone shall be well watered while in the heap, but shall contain no free water, and no water shall be added after it has been placed in the mixing box. Where water is obtained from a hose the supply must in all cases be regulated by means of a stopcock in the nozzle, and under the immediate control of the person holding the same. No more water shall be used than is absolutely necessary.

After the concrete has been thoroughly mixed, as required by these specifications, to the satisfaction of the Inspector, it shall be cast to place on the street, and the common practice of inverting the shovel to bring more of the mortar to the surface will not be permitted. After the concrete has been deposited on the street and spread to a proper thickness, it shall be well and thoroughly tamped with an iron tamper weighing not less than twenty-five (25) pounds, and having for its lower surface a plane six (6) inches square. The tamping shall be continued with full blows of not less than twelve (12) inches fall, until all portions of the surface have received at least two blows, and free mortar appears thereon, and there shall be at least one man tamping to each box of concrete mixers. During the hot weather the concrete shall be sprinkled as often as is deemed necessary by the Engineer or Construction Committee. The operation of mixing, spreading and tamping must be done as expeditiously as possible with a sufficient number of skilled men, and the finished work must not be entered upon with teams or barrows until in the judgment of the Engineer or Construction Committee the mortar is sufficiently set to prevent injury.

#### Machine Mixing.

If a concrete mixer is used, the necessary requirements shall be that a precise, accurate and regular proportion be controlled, and the product delivered from the machine shall be thoroughly mixed and in every way equal or superior to concrete mixed by hand, and shall fulfill all the requirements of the specification for hand-mixed concrete.

When the concrete has been mixed, spread on the streets and tamped, no coarse stones shall protrude above the surface, and the surface, when tamped, shall be parallel to and three (3) inches below the finished surface of the pavement. The whole operation of mixing and laying concrete shall be done in an expeditious manner and shall be entirely completed before the cement has begun its initial set. No retamping of concrete that has once set will be allowed. Continuous mixers of the self-feeding type are positively prohibited.

#### Stone Curbing.

All old curbing now set, that is not at the proper line or grade, must be so placed, and old stones that are broken or damaged, or less than four (4) feet in length, or which in the opinion of the

Engineer are unfit for service, shall be removed and replaced by new ones.

All the new and reset curbs must be set to the proper grade, and in a continuous line on each side of the street, and parallel with the center line of the street. At intersections of street lines and alleys the curbs shall be returned to the property line. All curbing shall be firmly set in a bed of four (4) inches of gravel, broken stone or cinders, the same to be well rammed on the bottom, and solidly tamped on both sides; up to the subgrade of the pavement on the face side, and to the top on the back. Where there is a deficiency of earth in the sidewalk, it shall be filled even with the top of curbing, and back of it not less than two (2) feet, so as to afford a good support to the same.

#### New Curbs.

New curbs must be of best limestone, free from cracks or seams.

The size of curbstones will be five (5) inches thick, and twenty-four (24) inches in depth, no stone to be less than four (4) feet in length. The top face to be of full thickness, square and neatly bush hammered, front face dressed to a depth of ten (10) inches and back to a depth of two (2) inches, leaving the top five (5) inches throughout; the ends to be dressed square to a depth of eighteen (18) inches, so as to make close joints.

The bottom of the stone must be straight and parallel with the top. When the pavement does not terminate against the curb or other pavement, the Contractor shall provide and lay on the line of termination a border of stone header, set on edge, same to be of best limestone, four (4) inches thick, twelve (12) inches wide and not less than three (3) feet long. The top edge of said header shall conform to the cross section of the street when finished.

#### Concrete Curbing.

Concrete curb shall be composed of four (4) parts limestone or granite, broken sufficiently small to admit of its passing freely through a one and one-half ( $1\frac{1}{2}$ ) inch ring, two (2) parts clean, sharp, river sand, free from dirt and foreign substances, and one (1) part of Portland cement of approved quality. All concrete for curbing to be mixed in the same manner as that used in foundation, except that the amount of water used must be so regulated as to admit of the removal of the forms as soon as the material is satisfactorily tamped.

All exposed portions of the curb are to have a one-half ( $\frac{1}{2}$ ) inch face of cement mortar, composed of three parts sand and one (1) part cement. Mortar to be placed against face of form, and then backed with concrete, and must be mixed sufficiently dry to admit of the prompt removal of the forms.

Concrete is to be put in place in layers of not more than six (6) inches, and each layer to be thoroughly tamped before the succeeding one is put in place.

As soon as concrete is brought to within one-half ( $\frac{1}{2}$ ) inch of

finished grade, the top to receive a one-half ( $\frac{1}{2}$ ) inch coat of cement mortar, as above described, and all forms are to be removed, and all exposed portions of the work are to be finished with brush or float, as may be directed by the Engineer.

Unless otherwise specified by the Engineer, all concrete curb shall be of the following dimensions: Twenty-four (24) inches in depth, measured on face, six (6) inches in width on top, and eight (8) inches in width on the bottom. The Engineer reserves the right to increase the depth of curb at such points as he may deem necessary, and wherever this may be done, the width of the bottom of the curb shall be increased sufficiently to allow a batter of one (1) inch to the foot, on the back of curb and six (6) inch top face. Front face of curb to be perpendicular in all cases.

#### Drain Pipe.

Double strength, salt glazed, vitrified clay pipe, of required diameter, shall be furnished and laid by the Contractor in such places as the plans may require or the Engineer may direct.

Standard salt glazed vitrified Clay Pipe, or Cement Pipe of approved pattern with two inch lap joints, having a hull with a thickness of 15% in excess of standard pipe, the proportions of  
55 material used to be 1 part Portland Cement to three parts sand and fine rock of required diameter, shall be furnished and laid by the Contractor in such places as the plans may require or the Engineer direct.

#### Brick Masonry.

Catch basins, or culverts, as per detail drawings shall be built where required, of hard burned brick in cement mortar, made of one (1) part of Portland cement of approved quality, and two parts sand. All brick, and the materials used therein will be subject to the inspection and approval of the Engineer, or his representative, and all inferior material will be rejected.

In all cases where the face of the work has a radius of less than three (3) feet, the inner course shall be composed of bats (half-brick) and the backing of whole brick.

Great care must be exercised to secure the proper breaking of joints, as any work which is deficient in this respect will be rejected, and must be made good at the Contractor's expense.

#### Cast Iron.

Cast iron covers and grates of patterns and sizes shown on plans shall be supplied and placed by the Contractor, as shown on plans or as the Engineer may direct.

#### Material in Street.

All rock, earth or other material now forming any part of the street, and which may be deemed suitable by the Engineer for use

in the new work, may be used, after having been approved by him, but no material shall be used without first being approved by the Engineer or his representative, and all rejected material shall be promptly removed from the vicinity of the work.

#### Guarantee.

The said party of the first part hereby guarantees the various forms of payments, constructed under this contract, as follows:

Sheet Asphalt for ten years after date of competition.

Arkansas Rock Asphalt for — years after date of completion.

Indian Territory Asphalt (Concrete Base) for — years after date of Completion.

Indian Territory Rock Asphalt (Asphalt Base) for — years after date of completion.

Bithulithic (Concrete Base) for — years after date of completion.

56 Bithulithic (Bitumenous Base) for — years after date of completion.

Brick for five years after date of completion.

And said party of the first part binds itself, its successors and assigns for the entire expense of all repairs which may become necessary from any imperfection in the said work of material, or any injury or worn out places, or any other defects due to traffic, or on account of breaking, crumbling or decay, and said party of the first part agrees to turn over such payment at the expiration of said specified time in a good condition and a good state of repair.

The said first party agrees that in addition to the construction bonds hereinafter referred to, it will give a good and sufficient bond to the said second party, in the sum of 10% of Bid dollars (\$—), conditioned that for the period above specified it will keep the pavement in good repair, as hereinafter noted, and will, at the expiration of such specified period, turn said pavement over to said City in a good condition and in a good state of repair.

If at any time within the period of guaranty, after the completion and acceptance of the work herein contracted for, the said work shall, in the judgment of the City Council, or the person or persons in charge of said streets and avenues, be required to be repaired or reconstructed, the person or persons in charge of said street shall notify the said first party to make the repairs or reconstruction required, and if the said first party shall neglect to proceed with such repairs within ten (10) days from the date of said notice, and immediately complete the same, then the said second party shall have the right to cause such repairs or reconstruction to be made, in such manner as it and the City Engineer may deem best; and the whole cost thereof, both for labor and material, shall be paid for at the expense of said first party and surety.

And it is further agreed that if the cost and expense of such repair or reconstruction shall not be paid by said first party as herein provided, immediately after the same has been completed, the said second party is hereby authorized to sue on said bond, for such cost



and expense, and recover such amount, together with all costs, including attorney's fee, and such suit shall not be a bar to further recovery on such bond, but said second party may continue to recover for such costs and expenses until said bond is exhausted.

It is further agreed by the parties hereto that, if at any time during the period of guaranty, as herein provided for, it becomes necessary to cut such pavement to make extensions, connections or repairs for water or sewer systems, or for any other municipal purpose, said second party has the right and authority to do so, and said first party shall claim no damage or violation of this contract by reason of defective work on the part of said second party, and said first party hereby agrees to put the same back in good condition, at a price not to exceed the price of construction of same, as herein agreed upon, at any time upon being given a ten days' notice so to do.

Said first party hereby agrees to keep at all times during the continuance of this contract an agent in Oklahoma City, Oklahoma Territory, upon whom any and all notices herein provided for may be served, the service of which shall be as binding as if served upon first party.

In the event that the street railway company may have secured a franchise to operate a street railroad on and along said street and has constructed its tracks thereon, and should fail to perform its portion of the paving of said street, as the other paving work on said street progresses, then the said Contractor shall proceed to pave that part of said street required to be paved or paid for by the said railway company, in conjunction with the progress of the other work.

### Bids.

All bids for work to be performed under this contract shall be accompanied by a certified check for 3% of Bid — Dollars (\$—), and in case of failure on the part of the successful bidder to enter into contract within twenty (20) days after notice of acceptance of such bid, said check to become the property of the City of Oklahoma City, as liquidated damages for failure to enter into such contract. Upon execution of said contract within said twenty (20) days, said check to be returned to the bidder furnishing it.

The said first party will be required to furnish, at the time of entering into contract for the work herein described, an approved bond, to the said second party, in the sum of 20% of Contract (\$—), for the faithful performance of the work, as herein specified, and within the specified time.

### *Form of Proposal.*

#### Binder Course.

The binder course, where specified to be used, shall be composed of clean, broken stone, equal in quality to stone used in base, and shall be of such size as to pass freely through an inch and a quarter (1 1/4) screen. Eighty-five (85%) per cent of this shall pass in its

longest dimension, and of the remaining fifteen (15) per cent, no piece shall be longer than two (2) inches in its longest dimension, and the stone, after passing through the heating drums, shall not contain less than five (5) per cent, nor more than fifteen (15) per cent of the material passing a No. 10 screen. Asphaltic cement of the same kind shall be used, but of a consistency of about twenty (20) points softer.

The broken stone shall be heated not higher than three hundred fifty (350) degrees, Fahr., in suitable appliances. It shall be thoroughly mixed by machinery with asphaltic cement such as is acceptable at three hundred to three Hundred Twenty-five (300 to 325) deg. Fahr. penetration sixty to ninety (60 to 90) District of Columbia Standard of Hardness, in such proportions that the resulting binder will have life and gloss without an excess of cement. Should it appear dull from overheating or lack of cement it will be rejected.

This binder shall be spread on the concrete base above described and while in a hot plastic condition shall be rolled with a five (5) ton steam roller until it has a uniform thickness of one and one-half inches. The upper surface shall be parallel with one and one-half inches below the surface of the pavement.

Binder that has been burned or that has become chilled shall be removed from the line of the work.

#### Asphaltic Cement Wearing Surface.

SEC. 1. Asphaltic Cement Wearing Surface shall be preceded by a binder course one and one-half inches thick prepared and laid on the concrete foundation, as hereinbefore specified.

SEC. 2. The Pavement Mixture for the Asphaltic Cement Wearing Surface shall be composed of: (a) Asphaltic Cement (Refined Asphalt and Flux). (b) Sand of Satisfactory grading and grain. (c) Filler, consisting of finely powdered mineral matter.

SEC. 3. The Asphalt employed in the preparation of the Asphaltic Cement for use in Asphaltic Surface Mixture shall be not less than 54% of solid native bitumen obtained from some natural deposit and which has been in use in the paving industry for at least 5 years. It shall be so refined as to be in every respect uniform and of a character recognized as being suitable for the production of a satisfactory Asphaltic Cement and in all respects satisfactory to the City Engineer and the City Chemist.

SEC. 4. The Oil used as a flux in the manufacture of the Asphaltic Cement shall be the residuum from any satisfactory petroleum from which the lighter oils have been removed by distillation without cracking and having a specific gravity of from 15 to 19 degrees Beaume. It shall not flash below 380 degrees Fahr. (New York closed Oil Tester) and shall not volatilize more than 4% in heating for seven hours at 325 degrees Fahr.

SEC. 5. The refined Asphalt Flux of a character corresponding to that described in the foregoing paragraphs shall be combined as follows:

To the melted asphalt at a temperature of not over 300 degrees Fahr. The Flux, after being heated to about 200 degrees Fahr. is

to be added in such proportions as to produce an Asphaltic Cement having a consistency such that its penetration shall be within the range of 45 and 55 degrees District of Columbia standard of hardness while the oil is being added agitation shall be continued until the Asphaltic Cement is homogeneous. The agitation shall be continued for at least three hours during which time the temperature shall be maintained at 300 to 325 degrees Fahr. Should the Finished Cement not prove of the proper consistency it shall be modified by the addition of further oil or melted asphalt as may be necessary.

SEC. 6. The Asphaltic Cement shall not contain any product of tar or other hydrocarbons except asphalts herein specified; but the use of Asphalt made by the distillation of California Asphaltic Oils to the amount of twenty-five per cent of the Asphaltic Cement will be permitted when at least fifty per cent of Trinidad, Cuban or Bermude Asphalt is used. The use of all other Asphalts produced by the distillation of Asphaltic Oils except in the case of Flux and that to an amount not to exceed Twenty per cent will not be allowed. The use of a Flux of Asphalt produced by the distillation or manipulation of Texas or Kansas Oils will not be allowed in excess of fifteen per cent.

Samples of all the component parts of materials to be used in making the Asphaltic cement shall be filed with the City Chemist with the formula to be followed five days before the date of receiving bids for the work, and each bidder shall submit with his samples an affidavit that the samples submitted are the materials which the contractor will use in the making of his Asphaltic Cement and that the same will be used in the proportion of the formula filed. The contractor will also be required to furnish the City Chemist with a certificate with each consignment of Asphalt showing what kind of Asphalt each shipment contained.

No Asphaltic Cement shall be used except that which is made from the several materials samples of which are filed and the manner of combining these materials shall be under the direction of the City Engineer and City Chemist. All Asphaltic Cement must be made under the direction of the City Engineer and City Chemist a plant to be located in Oklahoma City.

Samples of the Asphaltic Cement and of the materials from which it has been prepared shall be furnished the City Engineer and the City Chemist whenever required.

SEC. 7. The sand to be used shall consist of hard grains satisfactory in surface and shape, not containing more than one per cent of clay or loam. On sifting the whole shall pass a ten mesh screen; fifteen per cent shall pass an eighty mesh, and at least seven per cent shall pass a hundred mesh screen.

SEC. 8. The filler shall be powdered mineral matter of such a degree of fineness that the whole of it shall pass a fifty mesh screen at least 66% of it a two hundred mesh screen.

SEC. 9. The materials complying with the above specifications shall be mixed in proportion by weight, depending upon their character. The percentage of matter soluble in carbon by sulphide in

any pavement mixture shall be not less than ten per cent nor more than thirteen per cent.

SEC. 10. The sand and Asphaltic Cement shall be heated separately to approximately 340 degrees Fahr. for the former and 325 degrees Fahr. for the latter. The stone dust shall be mixed while cold with the hot sand. The Asphaltic Cement shall then be mixed with the sand and stone dust at the required temperature and in the [—] with the sand and stone dust at the required temperature and in the proper proportion in a suitable apparatus so as to effect a thoroughly homogeneous mixture.

SEC. 11. The Asphaltic paving Mixture prepared in the manner thus indicated shall be brought to the ground in carts at a temperature of not less than 250 degrees, nor more than 350 degrees Fahr. and if the temperature of the air is less than 60 degrees Fahr. the contractor must provide canvas covers for use in transit. It shall then be thoroughly spread by means of hot iron rakes in such a manner as to give a regular and uniform grade so that after having received its ultimate compression it will have a net thickness of one and one-half inches. This depth will be constantly tested by means of gauges furnished by the City Engineer. The surface shall then be compressed by a light roller, after which a small amount of hydraulic cement shall be swept over it and shall then be thoroughly rolled or compressed by a steam roller weighing not less than five tons. The rolling to be continued for not less than 5 hours for every one thousand square yards of surface.

SEC. 12. The paving mixture shall be composed of the above ingredients mixed together in proportion satisfactory to the  
61 City Engineer and City Chemist so that the pavement when laid shall not be so soft as to be unfit for travel on the hottest days in summer nor so hard as to disintegrate from the effects of the winter's cold.

When laid it shall be equal in consistency surface and durability of the best pavement of its kind.

#### Sheet Asphalt.

##### Foundation.

Foundation for sheet asphalt shall consist of a Five (5) inch layer of concrete prepared and put in place according to the general specifications for concrete, as hereinbefore noted.

##### Binder Course.

The binder course shall be one and one-half ( $1\frac{1}{2}$ ) inches in thickness, after being thoroughly rolled and compacted, and shall be composed of clean, broken stone equal in quality to the stone used in the concrete base, and shall be of such size as to pass freely through a one and one-quarter ( $1\frac{1}{4}$ ) inch screen. Eighty-five per cent of this shall pass in its longest dimension, and of the remaining 15 per cent, no piece shall be longer than two inches in its longest dimension, and the stone after passing the heating drums, shall not

contain less than five, nor more than fifteen per cent of material passing a number ten screen.

The stone shall be heated to not more than 350 degrees Fahr., in suitable appliances. It is then to be thoroughly mixed, by machinery, with asphaltic cement, such as is accepted for surface cement, at 300 to 325 degrees Fahr., penetration 60 to 90 degrees, District of Columbia Standard, in such proportions that the resulting binder will have life and gloss without an excess of cement. Should it appear dull from over-heating or lack of cement it will be rejected. While hot it will be hauled upon the work, spread upon the base so that when compacted it will be one and one-half [ $(\frac{1}{2})$ ] inches in thickness, and immediately rammed and rolled until it is cold. Should the resulting course not show a proper bond, it shall — immediately removed and replaced by the Contractor.

The Contractor shall not enter upon a concrete base in order to lay the binder course, until in the opinion of the Engineer or Construction Committee, it has obtained sufficient strength for such purpose, and during the period between laying base and binder he shall properly protect it, and when ordered by the Engineer shall sprinkle it as often as may be deemed necessary.

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#### Asphalt Surface.

The surface shall be made and laid according to the following specifications. The materials which shall be used therefor are: 1. Asphalt. 2. Heavy Petroleum. 3. Sharp, clean silicious river sand. 4. Fine, inorganic dust.

#### Asphalt.

The crude asphalt shall be refined until homogeneous and free from water. It shall not at any time reach a temperature high enough to injure it.

#### Heavy Petroleum Oil.

The oil in use for the manufacture of asphalt cement shall be petroleum. The petroleum must be one, from which the lighter oils have been removed by distilling without cracking, until the oil has the following characteristics. Flash point not less than 300 degrees Fahr., distillate at 400 degrees for thirty hours, less than ten per cent. The flash point shall be taken in a New York Closed Oil Tester. The distillate shall be made with about fifty grammes of oil in small glass retort, provided with a thermometer and packed entirely in asbestos. The residue in the retort after distilling must be a fluid at seventy-five degrees Fahr., and not coarsely crystalline after cooling.

#### Asphaltic Cement.

When the asphalt is not already of the proper consistency, the cement shall be prepared by tempering refined asphalt with heavy petroleum oil complying with the above specifications (at

a temperature between 250 and 350 degrees Fahr.) Its penetration must be within the range of 40 degrees and 60 Degrees District of Columbia Standard and shall be satisfactory to the Engineer and Construction Committee.

The asphalt cement must never be heated to a temperature exceeding 350 degrees Fahr.

Where asphalt cement containing over ten (10) per cent. of foreign material is kept in storage, it must be thoroughly agitated when used, and must also [—] dipping kettles while in use.

Samples of the asphaltic cement, and of the petroleum oil shall be supplied to the Inspector of Asphalts and Cements when required, and in suitable boxes and cans.

### Sand.

The sand shall be silicious, hard grained and moderately sharp. On sifting, it shall have at least fifteen (15) per cent. of material that would be caught on a 40 mesh per inch, screen; twenty-five (25) per cent. of material that will pass an 80 mesh per inch screen, ten (10) per cent. of which at least, will pass a 100 mesh per inch screen. If the sand to be used does not contain the desired fine material, lime-stone dust or other suitable material can be added to make up the deficiency.

### Asphalt Paving Mixture.

The materials complying with the above specifications shall be mixed by weight in the proportions adopted in standard asphalt pavements, depending upon their character, and the traffic on the street, and upon the character of the asphalt as determined by the Engineer, but the per cent of bitumen, in any mixture soluble in carbon bisulphide, shall not exceed the limits, 9 to 13 per cent. If the proportions of the mixture are varied in any manner from those specified, and, if already placed on the streets, it will be removed and replaced by proper materials at the expense of the Contractor.

The sand or the mixture of [said] and stone-dust, and the asphaltic cement will be heated separately to about 300 degrees Fahr. The dust, if lime-stone, will be mixed while cold, with the hot sand in the required proportions, and then mixed with the asphaltic cement at the required temperature, and in the proper proportion, in a suitable apparatus, so as to effect a thorough homogeneous mixture. Sand boxes and asphalt gauges, weighed in presence of Inspector as often as may be desired, shall be supplied at all times.

The pavement mixture prepared as indicated, will be brought to the ground in carts at a temperature of not less than 250 degrees, nor more than 350 degrees Fahr. It will then be thoroughly spread to a necessary thickness, by means of hot iron rakes, in such manner as to give uniform and regular grade, so that after having received its ultimate compression, it will have a net thickness of at least one and one-half ( $1\frac{1}{2}$ ) inches. This depth will be constantly tested by means of gauges furnished by the City Council, at the expense of the



Contractor. The surface will then be compressed by hand rollers, after which a small amount of hydraulic cement will be swept over it, and it will then be thoroughly compressed by a steam-roller weighing not less than 275 pounds to the inch run, the [follo-ing] being continued for not less than five hours, for every 100 yards of surface?

All apparatus required by these specifications for testing material, shall be furnished by the City Council at the expense of the Contractor. The City Council may at any time employ a competent expert to make tests of any and all materials embraced in these specifications, and the actual expense of said expert shall be paid by the Contractor.

64

### Arkansas Rock Asphalt.

#### Foundation.

Foundation shall consist of Five (5) inches of concrete, of same character as that used for Sheet Asphalt pavement.

#### Wearing Surface.

The wearing surface shall consist of finely ground Arkansas Rock Asphalt, or Rock Asphalt of equal quality, and carbonate of lime, the Rock Asphalt to be reduced to a powdered form, by first crushing, and then passing it through a system of rolls or breakers that will reduce it to a uniform degree of fineness that will make a perfectly substantial pavement when prepared and laid in the manner herein specified.

The carbonate of lime to be added shall be ground to such a degree of fineness that ninety (90) per cent will pass through a No. 100 screen, and shall be practically free from moisture when added to the powdered Rock Asphalt. The powdered carbonate of lime will be added in proportions best suited to withstand the conditions of traffic and climate, and the percentage, when determined shall be regulated by weight or measure.

The powdered Rock Asphalt, after the carbonate of lime is added shall form the mixture for the wearing surface and shall be heated in a suitable plant, so constructed with revolving paddles, as to effect a uniform and regular mixture, and during the process of mixing, these materials will be heated by steam, hot air blast, or both, to a temperature of 240 degrees to 300 degrees Fahr., according to the temperature of the weather, care being taken to see that the mixture does not come in too close contact with the fire or be so heated as to destroy or reduce the cementing power of the rock.

The heated mixture will then be carried to the street at a temperature of not less than 255 degrees Fahr., will be spread upon the foundation to a uniform depth and rolled with a two (2) ton steam-roller, and when the pavement has sufficiently cooled, a five and one-half (5½) ton roller will follow; the rolling to be continued until the asphalt has been thoroughly compressed, and its thickness shall not be less than two (2) inches. Places that cannot be rolled, shall be thoroughly tamped with hot rammers. Hydraulic cement will be

swept over the surface while it is still hot and the rolling is in progress, to give it a finished appearance.

Material overheated to such an extent as to produce crystallization or delivered underheated, so as to prevent a thorough cohesion and solidification of the mass, will be rejected.

Specimens of the crude asphalt rock, which it is proposed to use, shall be furnished by each bidder. The asphalt mixture  
65 will be tested as often as may be deemed necessary as the work progresses.

#### Alleys and Driveways.

Where the gutters are made of asphalt, a strip not less than twelve (12) inches wide, next to the curbing, shall be painted with an asphalt cement and ironed into the pavement with a hot smoother.

#### Indian Territory Rock Asphalt.

Natural Rock Asphalt pavements shall be constructed either with a concrete base as heretofore specified, or where deemed advisable they may be constructed without a concrete base, the foundation being made from the native asphalt as hereinafter set forth.

#### With Concrete Base.

Upon the prepared concrete foundation, there shall be laid an asphalt pavement, the material for which shall be the Natural Rock Asphalt, composed of pure Asphalt, and fine silicious sand, and which is technically known as Bituminous Sandstone, and which shall have been produced in the Chickasaw Nation, Indian Territory; and no bituminous limestone or carbonate shall be permitted, excepting where in the opinion of the Engineer, certain bituminous sandstone submitted may admit the admixture of bituminous limestone to advantage, but in no instance shall bituminous limestone be permitted to exceed twenty-five (25) per cent of the pavement.

No asphalt rock shall be used, which has not been thoroughly disintegrated, milled and processed so as to produce a uniform and homogeneous quality of the contained asphalt, and no crude asphalt rock, or those volatile, or excessively soft bitumen shall be admitted.

The material for the wearing surface shall be laid directly upon the concrete foundation in two courses. The first course shall be three-quarters ( $\frac{3}{4}$ ) of an inch thick, and shall be known as the cushion coat. The second course shall be one and three-quarters ( $1\frac{3}{4}$ ) inches thick, and shall be known as the wearing surface. Total thickness of pavement after ultimate compression shall be two and one-half ( $2\frac{1}{2}$ ) inches.

The material shall be heated to not less than 275 degrees Fahr., or more than 310 degrees Fahr. While hot it shall be carried to the street and raked to conform to the grade required.

The cushion coat shall be compressed, only with hand rollers not to exceed 1,000 pounds in weight and shall be allowed to cool partially before the top or wearing course is applied.  
66 The wearing surface shall be first compressed with hand

rollers of 1,000 pounds weight, and then as the mill heat decreases it shall be thoroughly rolled with a two and one-half ( $2\frac{1}{2}$ ) ton roller, and when cold shall be rolled with a roller of at least six (6) ton weight and not to exceed ten (10) tons.

#### Bituminous Base (Native Asphalt).

Over the sub-grade, which shall first be carefully rolled and compacted, shall be spread a two (2) inch course of rock asphalt (cold), which shall have been crushed so that the particles shall vary from that of sand grains to pieces that will pass through a two (2) inch ring; sufficient of the finer material being present to fill all voids and effect a perfect bond.

This course when evenly spread shall be compacted by rolling with a steam or horse roller having a weight or not less than six (6) tons, and said rolling shall continue until in the opinion of the Engineer no voids remain and the sheet is compact.

Over the first course shall be spread another similar course (cold) which shall be spread, rolled and treated in like manner.

Over the four (4) inch foundation so formed shall be spread a one (1) inch sheet of asphalt (hot), which material shall be prepared and laid in the following manner.

Rock Asphalt shall be used, which has been thoroughly milled and prepared so that it contains no lumps which will not disintegrate readily by heat.

This asphalt shall be heated on iron plates over open furnaces to a temperature of not less than 300 degrees Fahr., nor more than 310 degrees Fahr., and shall be constantly turned with shovels so as to prevent its burning. When properly heated it shall be spread over the surface of the pavement, raked to a uniform grade and rolled to compactness, but no roller shall be used which shall exceed 5,000 pounds in weight, and where additional compression shall be required it shall be supplied by tamping with hot tamps.

No heating of this asphalt shall be permitted on other than open plates, until the rotary mixer or other apparatus shall have been examined by the Engineer, and he shall have been satisfied that burning and scorching of the material are improbable in such machine.

All wearing surfaces composed of Indian Territory Rock Asphalt shall be dusted and swept (while hot, and during the rolling), with hydraulic cement, to give it an agreeable color and finished appearance, and when cold it shall be turned over to traffic.

67 There shall then be rolled into the surface a thin layer of stone chips, for the purpose of presenting a gritty surface.

#### Bitulithic Pavement.

#### Concrete Base.

Concrete foundation shall be Five (5) inches in thickness, and shall conform to the general specifications for concrete.

### Bituminous Base.

On the properly prepared subgrade crushed stone of slag shall be spread to a depth of six (6) inches, and compressed with a heavy steam road roller. If any considerable proportion of the foundation material is larger than three (3) inches it shall be separated, and the foundation laid in strata the coarsest pieces being placed at the bottom and the finer at the top. Where suitable gravel (consisting of not more than twenty-five (25) per cent finer than one-quarter inch) can be obtained, it may be used by spreading it to a depth of five (5) inches, and after thoroughly rolling it with a steam roller (wetting gravel when necessary), a layer of crushed stone two (2) inches in thickness shall be placed on the surface, and thoroughly rolled to the desired grade. On this foundation, after rolling, shall be spread a heavy coating of Warren's No. 24 Puritan Brand hard bituminous cement, or Bitulithic cement, for the purpose of firmly binding the foundation together and making it readily unite with the bituminous concrete wearing surface. One gallon of the bituminous cement shall be used to each square yard of surface.

### Wearing Surface.

On either of the foundations prepared as above specified shall be laid the wearing surface, which shall be composed of carefully selected, sound, hard crushed stone, mixed with bitumen and laid as hereinafter specified.

After heating the stone in a rotary mechanical dryer to a temperature of about 250 degrees Fahr., it shall be elevated and passed through a rotary screen, having six or more sections with varying sized openings, the maximum of which shall be one and three-quarters ( $1\frac{3}{4}$ ) inches and the minimum one-tenth ( $1/10$ ) of an inch in diameter. The several sizes of stone thus separated by the screen sections shall pass into a bin containing six sections or compartments. From this bin the stone shall be drawn into a weigh box, resting on a scale having seven beams. The stone from each bin shall be accurately weighed, in the proportions which have been previously determined, by laboratory tests, to give the best results, that is, the most dense mixture of mineral aggregate

68 and one having inherent stability. From the weight box each batch of mineral aggregate, composed of different sizes, accurately weighed as above, shall pass into a "twin pug", or other approved form of mixer. In this mixer shall be added a sufficient quantity of Warren's Puritan Brand No. — Bituminous waterproof cement, or Bitulithic cement, to thoroughly coat all the particles of stone and to fill all the voids in the mixture. The bituminous cement shall, before mixing with the stone, be heated to between 200 and 250 degrees Fahr., the amount used in each batch shall be accurately weighed and used in such proportions as have been previously determined by laboratory tests to give the best results, and to fill all the voids in the mineral aggregate. The mixing shall be continued until the combination is a uniform bitu-

minous concrete In this condition it shall be hauled to the street and there spread on the prepared foundation to such depth that, after thorough compression with a steam road roller, it shall have a thickness of two (2) inches. The proportioning of the varying of stone and bituminous cement shall be such that the compressed mixture shall — as closely as possible.

#### Surface Finish.

After rolling the wearing surface, there shall be spread over it a thin coating of Warren's Quick Drying Flush Coat Composition, the purpose of this coat being to completely fill any uneven-ess or honeycomb which may appear in the surface of the mixture.

#### General Specifications.

Each layer of the work shall be kept as free as possible from dirt, so that it will unite with the succeeding layer. The price bid per square yard for Bitulithic pavement must include the furnishing and mixing of all materials, labor and implements necessary to complete the pavement in accordance with the specifications for same.

The bituminous composition or cement shall in all cases be free from water, petroleum, oil, water-gas or process tars and shall be especially refined with a view to remove the light oil napthalene and other crystalline matter, susceptible to atmospheric influences.

If the crushed stone used does not provide the best proportions of fine grained particles, such deficiency must be supplied by the use of not to exceed fifteen per cent hydraulic cement, pulverized stone or very fine sand.

69

#### Brick Pavement.

##### Subgrade.

The surface of the roadbed to be paved shall be excavated to a depth of eleven inches below the established grade and general cross-section of the street, as shown on plans, or indicated by stakes furnished by the Engineer, and shall conform to the general specifications for subgrade.

##### Foundation.

The foundation shall consist of a Five (5) inch layer of concrete, as per general specifications therefor, and shall, after being properly tamped, be covered with a one and one half ( $1\frac{1}{2}$ ) inch layer of clean sand, after which said foundation must not be disturbed until, in the judgment of the inspector, a sufficient set has been secured.

##### Brick.

Upon the prepared foundation shall be laid one course of No. 1 vitrified brick, of approved quality, set on edge in courses at right angles to the direction of the street, except at street or alley inter-

sections, where all brick shall be laid with herring bone bond, unless otherwise ordered. All bricks shall be laid with as close joints as possible, and must be swept clean and rolled, and all broken or chipped bricks removed, and all gutters hand tamped to line and grade. Bricks shall be regular in shape and practically uniform in size, and must show by fractures a vitrified texture and freedom from lime pockets, cracks and other defects.

After the pavement has been brought to the proper finish by rolling, with a roller weighing not more than 1,000 pounds, the surface shall be swept clean and all joints filled with cement grout, composed of two parts sand and one part Portland cement, first mixed dry and then sufficient water added to form a thin grout which will run freely into the joints. Grout shall be mixed constantly until used. Surface of pavement shall be watered in advance of grouting, to allow same to run freely and fill all voids completely. All superfluous grout shall be removed with a broom.

W. C. BURKE,  
*City Engineer.*

Bill in Equity. Filed in the Circuit Court on Jan. 30, 1909.

*Restraining Order.*

Whereas, in the above named cause it has been made to appear upon the bill of the complainant filed herein, and the  
70 Exhibits attached thereto, and the affidavit of David McCormick, duly certified copies of which have this day been produced to the court, that writ of Injunction preliminary to the final hearing is proper, and that prima facie the complainant is entitled thereto enjoining the defendants herein and each of them from the acts complained of and threatened to be committed.

Now on motion of the said complainant, it is ordered that the defendants and each of them appear before the circuit court of the United States for the Western District of the State of Oklahoma, in the 8th Judicial Circuit, at the court room of said court at Guthrie in said District upon the 24th day of February, 1909, at 10 o'clock A. M. of said day, and then and there show cause, if any they have, why the preliminary injunction therein prayed for should not issue and it appearing to the court that there is danger of irreparable injury being caused to the complainant before the hearing of said application for the preliminary writ of injunction can be heard, unless the said defendants, and each of them are pending such hearing restrained as hereinafter set forth:

Therefore, complainant's application for such restraining order is hereby granted and it is ordered that you, the said City of Oklahoma city, a corporation duly organized and incorporated under the laws of the state of Oklahoma; Henry M. Scales as Mayor of the city of Oklahoma City; George Hess, as city clerk of the city of Oklahoma City; W. C. Burke, the city engineer of the city of Oklahoma City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. Peshek, J. W. Johnson, C. E. Mc-



Davie, S. A. Byers, and R. F. Helm as councilmen within and for the city of Oklahoma City and Mont F. Highley as president of said city council of the city of Oklahoma City, defendants herein; your agents, servants, employes and attorneys and all persons acting by or under your authority or direction, be and you each are hereby specially restrained from interfering with the above named complainant, David McCormick in carrying out and performing the terms and conditions of certain contracts for the paving and improving of certain streets within the city of Oklahoma City in Oklahoma County and State of Oklahoma, to-wit:

Second St. from east line of Blackwelder to East line of Ohio Ave.

Second St. from west line of Western Ave. to east line of Blackwelder Ave.

Third St. from west line of Lee Ave. to west line of Carey and Weavers Ave.

71 Fifth St. from west line of Walker Ave. to east line of Western Ave.

Sixth St. from west line of Robinson Ave. to east line of Walker Ave.

Sixth St. from east line of Walker Ave. to east line of Lee Ave.

Seventh St. from east line of Stiles Ave. to the west line of Stone-wall Ave.

Sixth St. from west line of Phillips to west line of Kelley Ave.

Ninth St. from west line of Dewey Ave. to the east line of Shartel.

Sixteenth St. from east line of Shartel Ave. to the east line of McKinley Ave.

Nineteenth St. from east line of Dewey Ave. to the east line of Western Ave.

Classen Boulevard from the north line of 16 st. to the north line of 37 St.

California Ave. from the east line of Shartel to the east line of Western Ave.

Eighteenth St. from the west line of Dewey Ave. to the east line of Shartel Ave. and Dewey Ave. from the north line of 17th St. to the south line of 19th St. and Lee Ave. from the north line of 17th St. to the south line of 19th St.

Walker Ave. from north line of 13th St. to the north line of 16th St.

Washington Ave. from the west line of Broadway to the east line of Robinson.

Washington Ave. from the west line of Robinson to the east line of Walker Ave.

Phillips Ave. from the north line of 4th St. to the north line of 10th St.

And that said defendants and each of them be and they are also restrained from making said improvements themselves and from permitting any one else to make them other than the said David McCormick and from furnishing any other person whomsoever, except the said David McCormick any grade stakes, data, profiles, specifications or information of any kind or character to aid them in making said improvements, and from doing or performing any act which

will prevent the said David McCormick from paving said streets and making the improvements described in the complainant's bill in equity filed herein, and from doing any act which will hinder or obstruct the said complainant in paving said streets and in making the said improvements. And said defendants and each of them are

72 also hereby restrained from levying any special assessment and from issuing any certificates against the lots, tracts, and parcels of land to be charged for the pavements and improvements to be made along the above described streets to any corporation, firm, person or persons whomsoever, except for the use and benefit of the said David McCormick.

And it is also hereby ordered that this restraining order shall extend to and be binding upon said defendants and each of them and upon their officers, agents, employes and attorneys and each and all persons whomsoever claiming or to claim any rights under them, until said complainant's application for a preliminary injunction can be heard and until the further order of the court, and shall, be in force and effect when the complainant shall give a bond in the sum of Ten Thousand Dollars (\$10,000.00) to be approved by the Clerk of this Court, indemnifying defendants against all damages they may sustain if it shall be determined that this restraining order is wrongfully issued. It is further ordered, however, that said restraining order against the issuance or delivery of said certificates for improvements shall be at once in force and effect and so remain for two days from this date irrespective of the giving of said bond.

It is further ordered that a copy of this order, certified under the hand of the clerk and the seal of this court be served on each of the defendants to be restrained thereby.

Dated at Guthrie, in the Western Judicial District of the State of Oklahoma, on this the 18th day of February, A. D., 1909.

JOHN H. COTTERAL,  
*Judge of the U. S. Circuit Court for the  
Western District of Oklahoma.*

Filed in the Circuit Court on Feb'y 19, 1911.

\* \* \* \* \*

(Here follows copy of the Restraining Order of February 19, 1909, which is omitted for the reason that a copy thereof appears at page 83 of the original transcript.)

*Clerk's Certificate to Copy of Restraining Order.*

UNITED STATES OF AMERICA,  
*Western District of Oklahoma, ss:*

I, Harry L. Finley, Clerk of the United States Circuit Court for the Western District of Oklahoma, do hereby certify the above and foregoing to be a full, true and complete copy of the original  
73 Restraining Order in case number 365, David McCormick, complainant, vs. The City of Oklahoma City, on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at Guthrie, Oklahoma, this 19th day of February, 1909.

[SEAL.]

HARRY L. FINLEY,  
Clerk U. S. Circuit Court,  
By GUY R. GILLETT, Deputy.

*Marshal's Return of Service of Restraining Order.*

I received the within writ February 19th, 1909, at Guthrie, Ok. and executed the same in Oklahoma City, Okla. as follows, served on Oklahoma City, Okla. by delivering to Geo. Hess, City Clerk of Oklahoma City, Okla. a complete true and correct copy of the Original Order and on George Hess City Clerk of Oklahoma City, Okla. and on W. C. Burke City Engineer of Oklahoma City, Okla. and on Henry M. Scales, Mayor of Oklahoma City Okla. and on Mont. F. Highley,—A. W. McWilliams,—W. F. Corder,—O. P. Workman,—L. L. Land,—M. Peshek,—J. W. Johnson,—C. E. McDavie, and S. A. Byers, Councilmen of Oklahoma City, Okla. and February 20th on R. F. Helm, Alderman of Oklahoma City, Okla. by delivering to each a complete true and correct copy of original order with all the endorsements thereon except R. F. Helm who was served by leaving a copy at office, and he accepted service over Telephone.

Fees and Expenses 14 Order.....	\$28.00
R. R. Fare Guthrie to Okla. City and return.....	1.26
St. L. & B. Okla. City.....	2.00
Automobile Hire .....	7.00
	<hr/>
	\$38.26

JNO. R. ABERNATHY.

Endorsed: No. 365. Restraining Order. Filed Feb'y 20th, 1909. Harry L. Finley, Clerk. By Guy R. Gillett, Dep'y. U. S. Marshal's Office, Guthrie, Okla. Feb. 19, 1909. No. 343. Return E. O. B. 1 Pg. 307.

\* \* \* \* \*

*Motion to Modify Restraining Order.*

74 Come now the defendants in the above entitled cause and move the Court to modify the restraining order heretofore on the 19th day of Feb. 1909, issued herein in the following manner to-wit:

1st. To strike out of said order all thereof, except such as restrains and prevents the City of Oklahoma City from issuing tax certificates or improvement bonds and making assessments against the lots and tracts of land chargeable with the cost of the improvements mentioned in complainant's bill.

2nd. To authorize the R. F. Conway Co. to proceed with the work of construction along the streets and avenues named in said bill.

3rd. To require the complainant to give bond in the sum not less [that] \$50,000.00 to inure to the benefit of the said City of Oklahoma City or R. F. Conway Co.

And for cause of such motion allege and say, that to stop the work of construction at this time would entail great and irreparable loss and injury to both the City and to said Conway Co.; that there are at this time about 700 men employed on said work; that great quantities of materials are constantly arriving and being used in said work; that the machineries used would remain idle; that two asphalt plants now being used would become idle and worthless in said work; that more than \$400,000.00 of paving is in the course of construction; that the force used would become demoralized and great inconvenience and damage occasioned thereby; that a number of the public streets of said City would be closed and become unfit for travel; and great and serious loss would be sustained to all of the defendants thereby. That to delay the work of construction on said streets would result in loss to the contractor in the probable sum of at least \$50,000. That the construction work in no manner affects the validity of the street improvement bonds, nor the issues in this cause, and pending the determination of the issues herein, the work of construction could proceed.

W. R. TAYLOR,

*City Att'y;*

G. A. PAUL,

*Attorneys for Defendants.*

Service of copy of within motion accepted Feb. 20, '09.

DAVID McCORMICK,

By BURWELL, CROCKETT &  
JOHNSON,

*Att'y- for Complainant.*

Filed in the Circuit Court on Feb. 20, 1909.

*Petition of R. F. Conway Company to be Made Party Defendant.*

75 Comes now R. F. Conway Co., a corporation doing business under the laws of the State of Oklahoma, and respectfully petitions and prays that it may be permitted to intervene as a party defendant in the above entitled cause, and for cause hereof alleges and says:

That [—] has a material and substantial interest in the result of said action; that it is now engaged in the construction of the paving embraced in the several streets and avenues stated in complainant's bill, under contract, lawfully executed with the City of Oklahoma City; that upon the completion and acceptance of said work of construction, said petitioner becomes the owner of the street improvement bonds, as payment for such work, and which said bonds are the only evidences of payment authorized by law; that this action

is to enjoin and prevent the said City of Oklahoma City from paying for said work in the manner herein set out; that the entire amount involved exceeds the sum of \$400,000.

G. A. PAUL,  
*Attorney for Petitioner.*

Filed in the Circuit Court on Feb'y 24, 1909.

*Amendments to the Bill of Complaint.*

Come- now the [Complain-t] and before any copy of his Bill has been taken from the Clerk's office by the Defendants and before any demurrer, motion or other pleading has been filed thereto files the following amendments to his original bill filed herein:

On Page Two (2), Line three (3) from the bottom of said Page, the word 'or' is stricken out, being the second word from the commencement of said line, and the word 'and' is substituted and inserted therefor so that said bill will read 'interest and costs' instead of 'interest or costs'.

On Page Forty-one (41) of said bill after the word accepted in line eighteen (18) from the top of said Page 41 and immediately following the words 'unconditionally accepted' and prior to the beginning of line nineteen (19) of said Page by inserting the following language and allegation:

76 "And said Complainant further alleges and shows that at the time said contracts were awarded to this complainant by the said City Council of the City of Oklahoma City, the said Complainant was present in the room wherein said City Council was then convened and in session and personally saw and heard the proceedings of said City Council and heard and saw said contracts afore-said awarded to him by said City Council.

JOHN DEVEREUX AND  
BURWELL, CROCKETT & JOHNSON,  
*Solicitors for the Complainant.*

David McCormick, being duly sworn says; that he is the Complainant in the foregoing bill of complaint; that he has read the foregoing amendments to his bill of complaint and knows the contents thereof and that the same are true of his own knowledge except as to matters there stated to be alleged on information and belief and that as to those matters he believed them to be true.

And further affiant saith not.

DAVID McCORMICK.

Subscribed and sworn to before me the undersigned authority, on this 24th day of February, A. D. 1909.

[SEAL.]

J. N. CURL,  
*Notary Public.*

My commission expires May 20, 1912.

Filed in the Circuit Court on Feb'y 24, 1909.

*Order of March 8, 1909, Denying Application for Temporary Injunction.*

Before Judge Cotteral.

Now on this March 8th, 1909, the application of the complainant herein for a temporary injunction, having been heretofore argued and submitted, upon the bill, affidavits and other proofs, and the Court being fully advised, it is ordered by the Court that the said application of complainant for a temporary injunction herein, be and the same is hereby denied and overruled. To which order and ruling of the Court, exceptions are allowed to the complainant.

*Memorandum Opinion on Application for Temporary Injunction.*

Burwell, Crockett & Johnson, for complainants.

Flynn, Ames & Chambers & G. A. Paul and W. R. Taylor, for defendants.

The complainant, David McCormick, has made application for a preliminary injunction, restraining the City from interfering with him in making the improvement of eighteen streets, and from making or permitting any other person to make the improvement, and from levying assessments or issuing certificates against the adjacent lots for the benefit of any other person. This application is based on the ground that the city had entered into contracts with him, whereby he was engaged to make these improvements.

The application has been heard upon the bill, affidavits and other proofs, from the foregoing, it appears that the City regularly advertised for bids for this work, that the complainant submitted his bids and that the council by formal resolution accepted such bids and awarded the contracts to him. No formal contracts in writing were signed. At a later session, this action of the council was reconsidered, and the bids of R. F. Conway Company were accepted and contracts were made with that company, which has been engaged for some time in making the improvements in controversy.

After consideration of the authorities, arguments and proofs, the court has arrived at the following conclusions:

1. Where a city in this state has determined to let a contract for a street improvement under the legislative act approved April 17, 1908, and has received bids therefor, it does not necessarily enter into contract with the lowest and best bidder by accepting his bid and awarding the contract, but may lawfully provide a method whereby the contract does not become complete until an instrument in writing shall be executed by both parties embodying all of the terms of their agreement.

2. If the latter method of contracting is in fact adopted by the city and this is known to a bidding contractor, and when his bid is



submitted and considered, it is the intention and understanding of both parties that the proposed contract is not to be complete until such writing is executed, the action of the city in adopting a resolution accepting the bid and awarding the contract does not of itself complete the contract, and may therefore be reconsidered and revoked at any time before the formal execution of the contract in writing.

3. By the terms of section four of the act referred to, a resolution must be adopted by the city, containing, among other things, the terms and conditions to be imposed with reference to the letting of the contract for the proposed improvement and directing the clerk to advertise for sealed proposals for the making of the improvement, and fixing the time and place of considering the same. Without unnecessary delay, the contract must be awarded to the  
78 lowest and best bidder who will perform all the conditions imposed by the mayor and council as prescribed in the resolution and notice.

In this case, it appears that a resolution was adopted authorizing and directing the engineer to prepare specifications for the proposed improvement to be strictly conformed to, and requiring the contractor to whom a contract might be awarded to execute the bonds prescribed by the act for the faithful performance of the contract and maintenance of *of* the work, and authorizing and directing the clerk to advertise for sealed bids, accompanied by certified checks for 3% of the amount bid, to be forfeited to the city in case the successful bidder should fail to enter into contract and give the required bond. The specifications also provide that said check shall accompany the bid, and further that in case of failure of the successful bidder to enter into contract within twenty days after notice of acceptance of the bid, the check shall become the property of the city, otherwise to be returned to the bidder. The bid was in terms on the basis of the specifications. It is therefore clear that it was the understanding of both parties that the contract was not to be complete until it should be formally executed in writing, and meantime and until the formal execution of the instrument embodying the terms agreed upon, there was no contract in force and either party was at liberty to recede from the negotiations. The City was not bound by any contract in this case, and not having done so, it was therefore free to revoke its resolution accepting the bid and awarding the contract. Having so acted, without executing the instrument which in the contemplation of the parties was necessary to consummate the contract, and the complainant resting his right to relief solely upon the basis of a contract with the city, which was not entered into, the application of the complainant for a temporary injunction must be denied.

March 8, 1909.

It is so ordered.

JNO. H. COTTERAL, *Judge.*

Filed in the Circuit Court on March 8, 1909.

*Answer to Bill.*

The defendants, now and at all times hereafter saving to themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material

79 or necessary for them to make answer to, answering says:

1st. That they admit that the defendant City is and was at all the times mentioned a municipal corporation and that the other defendants are now and were at the times in said bill stated the duly elected and appointed officers of said City. That they also admit that pursuant to the laws of the State of Oklahoma, certain proceedings were had and taken by the defendants for the construction of certain improvements in said City consisting of the paving of the several streets and avenues as in said bill set out and contained. They also admit that such work was to be performed in accordance with the plans, specifications and profiles of the City Engineer, and in accordance with the terms of the several resolutions lawfully enacted by the defendants.

2nd. Said defendants deny that they accepted the several bids submitted by the plaintiff; and deny that said plaintiff and defendants entered into contracts for the performance of said work; and deny that the said plaintiff performed any work upon said any of the streets of said City by reason of any contractual arrangement with the said defendants therefor.

3. Said defendants further answering say that all the proceedings referred to in plaintiff's bill were preliminary negotiations leading up to the formal execution of written contracts, and both the plaintiff and the defendants so understood said negotiations and each intended that such formal written contract should conclude such negotiations and no contract should be executed except by such written agreement between the parties thereto.

4th. That by the terms of such resolutions and the laws of the State of Oklahoma, the said plaintiff was required to make and execute an approved bond for the construction of such work and also to make and execute an approved bond for the maintenance thereof; and that such conditions were by law precedent to the execution of such contracts. That the defendants did not approve any bonds of the plaintiff, and did not enter into any contract with the said plaintiff for the performance of such work.

5th. That pending the said negotiations heretofore referred to the defendants lawfully rescinded their action whereby awards were made to the plaintiff and by proper and lawful act entered into written contracts with R. F. Conway Co. for the construction of said streets based on a five year remaintenance thereof.

80 6th. That on the 17th day of November, 1908, the said plaintiff began an action in the District Court of Oklahoma County, Oklahoma, to enjoin and prevent the said defendants and the said Conway Co. from performing the terms of said written contracts. That thereafter on the 4th day of December, 1908, the said

Court denied plaintiff the relief therein sought and thereafter the said Conway Co. proceeded with its work under said contracts, and now have a large portion of said work fully completed and the remainder thereof is in the course of construction at this time. That the said plaintiff saw and permitted the said Conway Co. and the said defendants to perform said work without interference or objection.

Wherefore these defendants having fully answered, confessed, traversed and avoided or denied all the matters in the said bill material to be answered, humbly pray this honorable court to enter its judgment and decree that these defendants be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained and for such further and other relief in the premises as to the honorable court may seem meet and in accordance with equity.

W. R. TAYLOR,  
FLYNN, AMES & CHAMBERS,  
G. A. PAUL,  
*Attorneys for Deft.*

UNITED STATES OF AMERICA,  
*State of Oklahoma, Western District,  
County of Oklahoma:*

Henry M. Scales, being duly sworn says that he is one of the defendants above named; that he is Mayor of the City of Oklahoma City and that the foregoing answer is true in point of fact and is not interposed for delay.

HENRY M. SCALES.

Subscribed and sworn to before me this 2nd day of April, 1909.  
[SEAL.] C. L. BURTON,  
*Notary Public.*

My commission expires July 5, 1911.

We hereby certify that the foregoing answer is, in our opinion, well founded in point of law.

W. R. TAYLOR,  
FLYNN, AMES & CHAMBERS,  
G. A. PAUL,  
*Counsel for Defendants.*

Filed in the Circuit Court on April 3, 1909.



& Construction Company he attended many meetings of the council of Oklahoma City where he was interested as a bidder and otherwise in various bids that were before the council; that it was the custom of the city council to give no notice in writing or otherwise to the party to whom its contracts for paving and public works were awarded, and that it was customary for those interested in these matters to attend the council chamber in order to ascertain whether they were the successful bidders or not, and that at no time did affiant ever know of the city of Oklahoma City giving any written or formal notice of the award of any contract.

R. E. BROWNELL.

Subscribed and sworn to before me by R. E. Brownell this 23rd day of February, 1909.

[SEAL.]

JNO. H. SHIRK,  
Notary Public.

My commission expires —.

My commission expires Feb. 19, 1912.

Filed in the Circuit Court on May 31, 1909.

#### EXHIBIT K.

#### *Affidavit of William W. Robinson.*

Affiant William W. Robinson states that he is a resident of Oklahoma City, Oklahoma, and is employed as District Superintendent for the Cleveland-Trinidad Paving Company and was so employed upon the fourth day of November, 1908; that he was at the city council chamber of Oklahoma City upon said day, when the various contracts for paving in Oklahoma City were awarded by the city council to the various paving companies, and was present when the various awards were made to David McCormick, at said time. Affiant states that he is acquainted with David McCormick, and George King, who was at that time Superintendent for David McCormick. He states that the said David McCormick and George King were both in the council chamber during the deliberations of the council at said time, when said awards were made to David McCormick.

Affiant states that he was Superintendent for the Barber Asphalt Paving Company and did the first work of paving in Oklahoma City, in 1902, '3 and '4. He states that this company did work in the business section of Oklahoma City, amounting to something near

83 \$700,000.00. That he had charge of said work and that at no time was it the custom of the city of Oklahoma City to notify the paving company that said company had received the award of any contract. But at all times it was the custom of the representatives of the paving company to attend the council and learn for themselves who received the award of the various contracts.

Affiant states that it has never been the custom of the city of Oklahoma City to notify any of the public contractors that they

were awarded any contract. It has been the custom for the various paving contractors as well as other contractors to ascertain for themselves who received the award for the various work which information was received either by attending the council meetings or from the city clerk or from some other source upon their own initiative.

WM. W. ROBINSON.

Subscribed and sworn to before me, by William W. Robinson, this 23 day of February, 1909.

[SEAL.]

EDITH E. LOOMIS,  
Notary Public.

My commission expires Feb. 5, 1912.

Filed in the Circuit Court on May 31, 1909.

### EXHIBIT L.

#### *Affidavit of David McCormick.*

STATE OF OKLAHOMA,  
Oklahoma County, ss:

Affiant David McCormick states that he is a resident of St. Louis, Missouri, and plaintiff in the above entitled action; that he was present at the meeting of the city council upon the 4th day of November, 1908, when the city council awarded the various contracts to the affiant involved in this litigation; that said city council is the city council of Oklahoma City which met in the council chamber of said city upon the day aforesaid; that the city council of Oklahoma City at said time and place and in the presence of the affiant David McCormick, plaintiff herein, awarded the eighteen contracts mentioned in his bill to him; affiant further states that he is president of the Parker-Washington Company; that said company has heretofore contracted with the city of Oklahoma City for paving to an amount exceeding two hundred and fifty thousand dollars; that affiant had the active charge of said negotiations with the city of Oklahoma City as president and general manager of said company; that at no time did the city of Oklahoma City even give notice in writing

84 or otherwise that the bids aforesaid were awarded to the Parker-Washington Company, but that the Company invariably attended the meeting of the city Council when said bids were passed upon and contract awarded; and that it learned of said awards by being present at the deliberations of the council and hearing same. Affiant further states that it was the custom of the city of Oklahoma City to award said contracts to the various public contractors without ever giving any formal notice of said award to the successful bidder, and that at no time did either the company of which he was president or himself ever receive any formal written notice or any other notice except the notice which they obtained by being present at the meeting and ascertaining the action of the council there. Affiant states that it was not the custom of the city of



Oklahoma City to give any formal notice to the various contractors to whom contracts were awarded; that same had been awarded to them, but that it was the custom of the contractors to ascertain these facts by their own investigation.

DAVID McCORMICK.

Subscribed and sworn to before me by David McCormick this 23rd day of February, 1909.

[SEAL.]

EDITH E. LOOMIS,  
*Notary Public.*

My commission expires Feb. 5, 1912.

Filed in the Circuit Court on May 31, 1909.

### EXHIBIT M.

#### *Affidavit of David McCormick.*

Now comes David McCormick of lawful age, being first duly sworn according to law deposes and states that he is the complainant in the above entitled cause. And further states that there is being work done on some of the various streets referred to in his bill in equity in this case; that he knows of his own personal knowledge that some of said streets are being graded and the improvements for the making of which the complainant claims to have a contract are being made; that the said improvements are being made with the consent of the city of Oklahoma City, and its officers, who are named as defendants in the above entitled action, and that said work is in progress at the present time, and that there is and has been for the last few days a large force of men at work in the said streets with teams and shovels and other appliances for the doing of the said work, and that unless the said city of Oklahoma City, its officers and agents be restrained the said work will be completed and the complainant herein deprived of the fruits of his said contract, and further affiant sayeth not.

DAVID McCORMICK.

85      Subscribed and sworn to before me, the undersigned authority, on this — day of —, 1909.

[SEAL.]

HATHAWAY HARPER,  
*Clerk of the District Court,*  
*Oklahoma Co., Okla.,*  
By J. F. HAVENS, *Dep. Clerk.*

Filed in the Circuit Court on May 31, 1909.

#### *Stipulation as to Evidence and Hearing of Cause.*

It is hereby stipulated and agreed by and between the complainant in the above entitled case and the above named defendants and each of them that Whereas there was a hearing between the com-

plainant and the above named defendants, in the above entitled court, sitting within the city of Oklahoma City, in Oklahoma county and State of Oklahoma, within the Western District of Oklahoma, the Hon. John H. Cotteral, District Judge presiding, in which the said complainant, sought to obtain in said court a temporary injunction as prayed for in the bill of equity, of the complainant, and Whereas on said hearing certain oral testimony affidavits, records and other evidence was introduced by the respective parties to the said action, and it being desired by all of the parties to this action to avoid unnecessary costs and expenses, it is hereby stipulated and agreed by and between all of the parties to this action, that the stenographer who took the said evidence on said trial, and who reported the said case at the hearing and trial for the temporary injunction shall transcribe his stenographic notes and make a true, full, correct and complete transcript of all of the affidavits, oral testimony and other evidence introduced upon said hearing for the temporary injunction, and that said affidavits testimony and other evidence introduced upon the trial and hearing for said temporary injunction when transcribed by said court reporter shall be considered by the court on the final hearing of the above entitled case with the same force and effect as if taken in the usual way under the strict rules of said court for the taking of evidence in a like case for the final trial thereof, and that the above entitled court shall give to said evidence as shown by said transcript when it shall have been made, the same force and effect as it would give the evidence taken under the rules of said court in equity cases, each and all of the parties hereto hereby waiving any and all objections by reason of said evidence not having been taken as provided by the rules of the court, it being understood and agreed that the objections and exceptions made and taken by the respective parties on the hearing for said temporary injunction shall be considered as having been made upon the final hearing and trial of said case.

It is further hereby stipulated and agreed for the purposes of this trial only that the Conway Paving Company have completed the work of paving the streets involved in this action, under the contract between the city of Oklahoma City and the said Conway Paving Company, and it is also further stipulated and agreed for the purposes of this trial only, between all of the parties hereto that the complainant, shall have the right and privilege of filing affidavit showing as to whether or not David McCormick the complainant in this action at the time he filed his bid for the paving of the streets and the making of the improvements referred to in his bill in equity or complaint, and at the time the award was made by the city council to the said David McCormick, for the doing of said work, and for the making of said improvements, and as to whether or not said David McCormick has at all times since the filing of said bid been fully prepared, able and willing to make said improvements and to pave said streets pursuant to the plans and specifications upon which his bid was made, and also showing as to whether or not the said David McCormick was at the time of the

filing of said bid and has been ever since said time a responsible bidder, and financially able to carry out and perform all of the requirements of said city for the paving of said streets and the making of said improvements, it being expressly understood and agreed that the above entitled court on the final hearing of said case shall give to said affidavits the same force and effect as if the testimony of these witnesses were taken in the usual way under the rules of the above entitled court and it is further stipulated and agreed that no objections shall be made by either party to this action on the ground that the affidavits or other evidence introduced upon the trial for a temporary injunction is not such evidence as may be used on the final hearing of a case of this kind; provided, however, that said affidavits or other evidence was such as could be used under the rules of this court or under the permission of the presiding judge for the hearing on the application of the temporary injunction.

It is further hereby stipulated and agreed that the above entitled court shall render judgment in this case as it finds under this stipulation, the pleadings, the record, the affidavits and other evidence taken upon the hearing of the temporary injunction and the law applicable to said case shall require.

Each of the parties to this action hereby reserves the right  
87 and privilege to argue and present to the court any argument or authorities bearing upon the issue involved and hereby request the court to fix a day certain at such time as may suit convenience after the court reporter shall have transcribed the affidavits, testimony and other evidence and record of the hearing of the temporary injunction for the final hearing of this case.

And it is further hereby stipulated and agreed that the above entitled court shall give full force and effect to this stipulation, liberally construing the same to the end that the purposes of the parties hereto may be carried out and given full force and effect.

This stipulation and agreement is made and entered into on this the 24th day of June, A. D. 1909.

DAVID McCORMICK, *Complainant*,  
By JOHN DEVEREUX AND  
BURWELL CROCKETT & JOHNSON,  
*His Attorneys, and*  
G. A. PAUL,  
FLYNN, AMES & CHAMBERS,  
THE CITY OF OKLA. CITY,  
By JAS. S. TWYFORD, *City Att'y.*  
*Defendant's Attorneys.*

Filed in the Circuit Court on July 17, 1909.

\* \* \* \* \*

*Testimony for Complainant.***Hearing on Application for Temporary Injunction.****Appearances:**

Burwell, Crockett & Johnson, for Complainant.

G. A. Paul, Flynn, Ames & Chambers, and Wm. Taylor, for Defendants.

This matter came on for hearing before the Judge of the above entitled court in his chambers at Oklahoma City, on the — day of March, 1909, and the following evidence was offered and proceedings had in said hearing:

*Testimony for Complainant.*

MR. BURWELL: We offer the original bill in evidence, in support of our application; also the amendments thereto; We ask that they be considered in evidence.

We offer in evidence now, Paving Resolution No. 1 of the City Council of Oklahoma City, found on page 174 Council Journal No. 12; also Resolution No. 2 found on page 175 of the same journal; also resolution No. 4 found on page 176 of the same journal. (These resolutions will be found at the end of this transcript, marked Exhibit "A").

We offer in evidence resolution of the Mayor and Council of the City of Oklahoma City, providing for the preparation of the plans and specifications, on page 209 of the same journal.

(See Exhibit "B" at the end of the transcript.)

Similar resolutions are also admitted with reference to the other streets involved in this suit, and it is agreed by counsel for both parties that these resolutions covering the other streets will be considered in evidence. Both parties concede the validity of the proceedings up to the time of the awarding of the contract.

We also offer in evidence the general specifications for the paving and curbing.

MR. PAUL: We cannot admit these are the general specifications. You will have to prove them, because I don't know whether they are or not.

MR. BURWELL: Exhibit A, attached to the original bill, is introduced in evidence and admitted.

Complainant here introduces in evidence the plans and profiles for the work which are eighteen in number.

We offer in evidence now the notice published by the Clerk under direction of the City council calling for bids which was published on October 21 to 31, 1908. (See Exhibit "D" attached at the end of the transcript.)

We also offer in evidence another notice to pave which was published October 21, to 31 Marked "Exhibit E" and attached hereto.

We now introduce in evidence the proposals of bids filed by David McCormick, which are eighteen in number, marked Exhibit 1 to 18 inclusive.

We wish to introduce in evidence certain proceedings of the City Council found on council Record No. 12, page 223 as follows:

### EXHIBIT C.

#### *Minutes of Meeting of City Council, Nov. 2, 1908.*

Meeting of November 2, 1908.

"Bids were opened and read for the constructing of paving as per advertisements for bids, ending at 5 o'clock p. m. November 2, 1908."

89 We also introduce in evidence extract from record of city council Journal No. 12, at page 227, meeting of November 4, 1908.

"Moved by Mr. Byers seconded by Mr. McWilliams that the council reject all bids for asphalt paving based on five year guarantee. Motion carried by unanimous roll call vote.

Moved by Mr. McDavie, seconded by Mr. McWilliams that all bids of J. F. Hill for paving of the different streets as per advertisement for bids, ending at 5 o'clock P. M. November 2, 1908, be rejected and not considered at sample of materials to be used submitted by him were not in accordance with specifications of the City Engineer for this work. Motion carried by unanimous roll call vote.

Moved by Mr. Helm, seconded by Mr. Land, that all bids for asphalt paving be rejected and the clerk instructed to re-advertise for bids for this work.

Moved by Mr. McDavie, seconded by Mr. McWilliams, as a substitute for Mr. Helm's motion that the bids for asphalt paving be taken up street by street and contracts awarded to the lowest and best bidder.

Substitution motion carried by roll call vote.

We now offer in evidence extract from council record No. 12, page 228, meeting of the date November 4, 1908:

### EXHIBIT F.

#### *Minutes of Meeting of City Council, Nov. 5, 1908, Awarding Contracts for Paving Certain Streets to David McCormick.*

OKLAHOMA CITY, OKLA., November 4, 1908.

"Council met in adjourned session at 2:30 p. m. with Mayor and following members present; Highley, Workman, Helm, Peshek, Johnston, McWilliams, McDavie, Land and Byers came in later.

"Moved by Mr. Workman seconded by Mr. Helm, that council re-consider action taken at meeting held in forenoon of this date





Manholes complete at .....	\$40.00
Catch Basins at .....	20.00
Approx. total .....	\$
R. F. Conway total .....	\$

City Engineer Burke, reported that the bid of David McCormick was the lowest and best bid for the paving of Third Street from W. Line of Lee ave. to W. Line of Carey and Weaver's Addition, to the City of Oklahoma City.

David McCormick.

Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Peshek, Johnston, McWilliams, and McDavie; Nays: Messrs. Workman, Helm and Land.

The bids were as follows:

Asphalt paving inc. 5" Portland C. Con. Found. 10 y. guar.	
per sq. yd.	\$2.10
Earth Excavation, per cu. yd.	.35
Concrete Curb, and gut. str. 6" curb, per lin. ft.	.74
" " " rad. 6" " "	.74



Concrete curb and gut. rad. 6" curb, per lin. ft.....	.74
Concrete double gutter per lin. ft.....	.74
3" Oak header, per lin. ft.....	.15
Vit. pipe in place with back fill, per lin. ft. 10 60c; 12" 80c.	
Manholes, complete each .....	40.00
Catch basins, each .....	20.00
Approx. total \$.....	
R. F. Conway " \$.....	

Moved by Mr. McWilliams, seconded by Mr. Johnston, that the bid of David McCormick, being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote; except Messrs. Workman and Land voting Nay.

94 City Engineer Burke reported that the bid of David McCormick was the lowest and best bid for the paving of Sixth Street from the W. line of Phillips Ave. to the W. line of Kelley Ave. Oklahoma City, Okla.

The bids were as follows:

David McCormick.

Asphalt paving inc. 5" Portland C. Con. Found 10 y. guar. per sq. yd.....	\$2.10
Earth Excavation per cu. yd.....	.35
Concrete curb and gut. str. 6" curb, per lin. ft.....	.74
Concrete curb and gut. rad. 6" curb, per lin. ft.....	.74
Concrete double gutter per lin. ft.....	.74
3" Oak header, per lin. ft.....	.15
Vit. pipe in place with back fill, per lin. ft. 10" 60c; 12" 80c; 15" 1.00.	
Manholes complete each .....	30.00
Catch basins, each .....	20.00

Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick, being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote; Ayes: Messrs. Highley, Peshek, Johnston, McWilliams, McDavie, and Helm; Nays: Messrs. Workman and Land.

City Engineer Burke reported that the bid of David McCormick was the lowest and best bid for the paving of Seventh Street from E. line of Stiles Ave. to W. line of Stonewall ave., Oklahoma City, Okla.:

The bids were as follows:

David McCormick.

Asphalt paving. Inc. 5" Portland C. Con. Found. 10 y. guar. per sq. yd.....	\$2.09
Earth Excavation per cu. yd.....	.35

Rock Excavation per cu. yd.	.70
Concrete curb and gut. str. 6" curb. per lin. ft.	.74
Concrete curb and gut. rad. 6" curb. per lin. ft.	.74
Concrete double gutter per lin. ft.	.74
Vit. Pipes in place with back fill, per lin. ft. 10" 60c; 12" 80c;	
15" 18" \$1.55.	
Manholes complete each	40.00
Catch basins, each	20.00
Approx. total \$	
R. F. Conway "	\$

95 Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick, being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes, Messrs. Highley, Peshek, Johnston, McWilliams, McDavie and Helin; Nays: Messrs. Workman and Land.

City Engineer Burke reported that the bid of David McCormick was the lowest and best bid for the paving of Ninth Street from E. Line of Dewey ave. to the E. line of Shartel Ave. Oklahoma City, Okla.:

The bids were as follows:

#### David McCormick.

Asphalt paving inc. 5" Portland C. Con. Found 10 y. guar.	\$2.09
per sq. yd.	.35
Earth Excavation, per cu. yd.	.74
Concrete curb and gut. str. 6" curb. per lin. ft.	.74
Concrete curb. and gut. rad. 6" curb. per lin. ft.	.74
Concrete double gutter per lin. ft.	.74
Concrete single gutter per lin. ft.	.15
3" Oak header, per lin. ft.	\$1.00
Vit. pipe in place with back fill, per lin. ft. 10" 60c; 15" .	40.00
Manholes complete each.	20.00
Catch basins, each.	
Approx. total \$	\$—.
R. F. Conway "	\$—.

Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Peshek, Johnston, McWilliams, McDavie and Helin; Nays: Messrs. Workman and Land.

City Engineer Burke reported that the bid of David McCormick was the lowest and best bid for the paving of Sixteenth St. from E. line of Shartel Ave. to E. line of McKinley ave., Oklahoma City, Okla.:

The bids were as follows:

## David McCormick.

96 Asphalt paving inc. 5" Portland C. Con. Found.	
10 y. guar. per sq. yd.....	\$2.09
Earth Excavation per cu. yd.....	.35
Concrete curb and gut. str. 6" curb. per lin. ft.....	.74
Concrete curb and gut. rad. 6" curb. per lin. ft.....	.74
Concrete double gutter per lin. ft.....	.74
3" Oak header, per lin. ft.....	.15
Vit. pipe in place with back fill, per lin. ft. 10"	
60c; 12" 80; 15" \$1.00.	
Manholes complete each.....	40.00
Catch basins, each.....	20.00
Approx. total \$—.	
R. F. Conway " \$—.	

Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Peshek, Johnston, McWilliams, McDavie and Helm; Nays: Messrs. Workman and Land.

City Engineer Burke reported that the bid of David McCormick was the lowest and best bid for the paving of Nineteenth Street from E. line of Dewey to E. line of Western Ave., Oklahoma City, Okla.

The bids were as follows:

## David McCormick.

Asphalt paving inc. 5" Portland C. Con. Found.	
10 y. guar. per sq. yd.....	\$ 2.09
Earth Excavation per cu. yd.....	.35
Concrete curb and gut. str. 6" curb. per lin. ft.....	.74
Concrete curb and gut. rad. 6" curb. per lin. ft.....	.74
Concrete double gutter, per lin. ft.....	.74
3" Oak header, per lin. ft.....	.15
Vit. pipe in place with black fill, per lin. ft.	
10" 60c; 12" 80c; 15" \$1.00; 25" 2.30	
Manholes, complete each.....	40.00
Catch basins, each.....	20.00

Moved by Mr. McWilliams, seconded by Mr. Peshek, that the bid of David McCormick being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Peshek, Johnston, McWilliams, McDavie and Helm; Nays: Messrs. Workman and Land.

97 City Engineer Burke reported that the bid of David McCormick was the lowest and best bid for the paving of Classen Boulevard from N. line of 15th St. to N. line of 27th St., Oklahoma City, Okla.

The bids were as follows:

## David McCormick.

Asphalt paving inc. 5" Portland C. Con Found.	
10 y. guar. per sq. yd.	\$2.19
Earth Excavation per cu. yd.	.35
Rock Excavation, per cu. yd.	.70
Embankment, per cu. yd.	.20
Concrete curb and gut. str. 6" curb per lin. ft.	.85
Concrete curb and gut. rad. 6" curb per lin. ft.	.90
Concrete curb and gut. str. 4" curb per lin. ft.	.80
Concrete curb and gut. rad. 4" curb per lin. ft.	.85
Resetting Stone curb per lin. ft.	.85
Concrete double gutter per lin. ft.	.90
3" Oak header, per lin. ft.	.15
Vit. pipe in place with backfill, per lin. ft.	
10" 60c; 12" 80c; 15" \$1.00; 18" \$1.55; 21" \$1.75; 24"	
\$2.30.	
Manholes, complete each.	40.00
Catch Basins, each.	20.00
Approx. total	\$—.
R. F. Conway	" \$—.

Moved by Mr. McWilliams, seconded by Mr. Peshek, that the bid of David McCormick being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Pe-hek, Johnston, McWilliams, McDavie and Helm; Nays: Messrs. Workman and Land.

City Engineer Burke reported that the bid of David McCormick was the lowest and best bid for the paving of California Ave. from E. line of Shartel Ave. to E. line of Western Ave., Oklahoma City, Okla.

The bids were as follows:

## David McCormick.

Asphalt paving inc. 5" Portland C. Con. Found.	
10 y. guar. per sq. yd.	\$2.10
Earth Excavations per cu. yd.	.35
98 Concrete curb and gut. str. 6" curb per lin. ft.	.74
Concrete curb and gut. rad. 6" curb per lin. ft.	.74
Resetting stone curb per lin. ft.	.20
Concrete double gutter, per lin. ft.	.74
Concrete single gutter, per lin. ft.	.56
3" Oak header, per lin. ft.	.15
Vit Pipe in place with backfill, per lin ft.	
10" 60c; 12" 80c.	
Manholes complete, each.	40.00
Catch basins, each.	20.00
Approx total	\$—.
R. F. Conway	" \$—.



Moved by Mr. McWilliams, seconded by Mr. Highley, that the bid of David McCormick being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes, Messrs. Highley, Peshek, Johnston, McWilliams, McDavie and Helm; Nays: Messrs. Workman and Land.

City Engineer Burke reported that the bid of David McCormick was the lowest and best bid for the paving of Eighteenth St. from W. line of Dewey Ave. to E. line of Shartel Ave.; Dewey Ave. from N. line of 17th St. to S. line of 19th St.; Lee Ave. from N. line of 17th St. to S. line of 19th St., Oklahoma City, Okla.

The bids were as follows:

David McCormick.

Asphalt paving inc. 5" Portland C. Con. Found.	
10 y. guar. per sq. yd.	\$2.09
Earth Excavation per cu. yd.	.35
Concrete curb and gut str. 6" curb per lin. ft.	.74
Concrete curb and gut rad. 6" curb per lin. ft.	.74
Concrete double gutter, per lin ft.	.74
3" Oak Header, per lin. ft.	.15
Vit. pipe in place with backfill, per lin. ft.	
10" 60c; 12" 80c; 21" \$1.75; 24" \$2.30.	
Manholes complete, each.	40.00
Catch basins, each.	20.00
Approx total	\$—.
R. F. Conway "	\$—.

Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described streets. Motion carried by the following roll call vote: Ayes: 99 Messrs. Highley, Peshek, Johnston, McWilliams, McDavie and Helm; Nays: Messrs. Workman and Land.

City Engineer Burke reported that the bid of David McCormick was the lowest and best bid for the paving of Walker Ave. from N. line of 13th St. to N. line of 16th St. Oklahoma City, Okla.:

The bids were as follows:

David McCormick.

Asphalt paving inc. 5" Portland C. Con. Found 10 yr. Guar.	
per sq. yd.	2.09
Earth Excavation per cu yd.	.35
Concrete curb and gut. str. 6" curb per lin. ft.	.70
Concrete curb and gut. rad. 6" per lin ft.	.90
Concrete double gutter, per lin ft.	.70
3" Oak Header, per lin ft.	.15
Vit. Pipe in place with backfill per lin ft.	
10" 60c; 12" 80c; 15" 1.00.	
Approx. total.	\$—.
R. F. Conway, total,	\$—.

Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Peshek, Johnston, McWilliams, McDavie and Helm; Nays: Messrs. Workman and Land.

City Engineer Burke reported that the bid of David McCormick was the lowest and best bid for the paving of Washington Ave. from W. line of Broadway to E. line of Robinson Ave., Oklahoma City, Okla.

The bids were as follows:

David McCormick.

Asphalt paving inc. 5" Portland C. Con. Found 10 y. guar.	
per sq. yr.....	\$2.10
Earth Excavation per cu yd.....	.35
Concrete curb and gut. str. 6" curb per lin. ft.....	.75
Concrete curb and gut. rad. 6" curb per lin. ft.....	.75
Concrete double gutter, per lin. ft.....	.75
3" Oak Header, per lin. ft.....	.15
100 Approx. total.....	\$.....
R. F. Conway, total \$.....	

Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Peshek, Johnston, McWilliams, McDavie and Helm; Nays: Messrs. Workman and Land.

City Engineer Burke reported that the bid of David McCormick was the lowest and best bid for the paving of Washington ave. from the W. line of Robinson ave. to the E. line of Walker ave. Oklahoma City, Okla.

The bids were as follows:

David McCormick.

Asphalt paving inc. 5" Portland C. Con. Found. 10 y. guar.	
per sq. yr.....	\$2.10
Earth excavation per cu. yd.....	.35
Concrete curb and gut. str. 6" curb per lin. ft.....	.75
Concrete curb and gut. rad. 6" curb per lin. ft.....	.75
Concrete double gutter, per lin. ft.....	.75
3" Oak Header, per lin. ft.....	.15
Vit. pipe in place with backfill, per lin. ft.	
10" 60c.	
Approx. total.....	\$.....
R. F. Conway, total..	\$.....

Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best bid be accepted

and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Peshek, Johnston, McWilliams, McDavie and Helm; Nays: Messrs. Workman and Land.

City Engineer Burke reported that the bid of David McCormick was the lowest and best bid for the paving of Phillips ave. from the N. line of 4th st. to the N. line of 10th st., Oklahoma City, Okla.

The bids were as follows:

David McCormick.

101 Asphalt paving inc. 5" Portland C. Con. Found. 10 y.	
guar. per sq. yd.....	\$2.09
Earth excavation per cu. yd.....	.35
Concrete curb and gut. str. 6" curb per lin. ft.....	.73
Concrete curb and gut. rad. 6" curb per lin. ft.....	.73
Concrete double gutter, per lin. ft.....	.75
3" Oak Header, per lin. ft.....	.15
Vit. pipe in place with backfill, per lin. ft.	
10" 60c; 12" 80c.	
Manholes, complete each.....	40.00
Catch Basins, each.....	20.00
Approx. total.....	\$.....
R. F. Conway, total..	\$.....

Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best bid be accepted and — be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Peshek, Johnston, McWilliams, McDavie and Helm; Nays: Messrs. Workman and Land.

We offer now in evidence the proceedings of the council found in council record No. 12 at page 242, as follows:

OKLAHOMA CITY, OKLAHOMA, November 4, 1908.

"Moved by Mr. Helm, seconded by Mr. Workman, that the action of the council in awarding contracts for asphalt paving at this meeting be rescinded. Motion lost by the following roll call vote: Ayes: Messrs. Workman, Helm and Land, Nays: Messrs. Highley, Peshek, Johnston, McWilliams, McDavie and Byers.

EXHIBIT G.

*Minutes of Meeting of City Council, Nov. 9, 1908.*

We now offer in evidence extract from Council record No. 12 at page 248, as follows:

OKLAHOMA CITY, OKLAHOMA, November 9, 1908.

"Moved by Mr. Highley, seconded by Mr. Helm, that the council re-consider the action taken at meeting held November 4, 1908,

"In rejecting all bids for asphalt pavement based on five year guarantee". Motion carried by the following roll call vote: Ayes, Messrs. Highley, Workman, Helm, Corder, Peshek, Johnston, and Land: Nays: McWilliams, McDavie and Byers.

102 Moved by Mr. Highley, seconded by Mr. Corder that the council re-consider the action taken at the meeting held November 4, 1908, in awarding contracts for all asphalt paving.

Moved by Mr. Land, seconded by Mr. McWilliams, that the council adjourn to meet at ten o'clock, A. M. November 10, 1908, to give City Attorney Taylor an opportunity to investigate the law in regard to the legality of above motion of Mr. Highley. Motion Carried.

#### EXHIBIT H.

##### *Minutes of Meeting of City Council, Nov. 10, 1908.*

We now offer in evidence extracts from council proceedings as found in council record No. 12 at page 250, under date of November 10, 1908;

OKLAHOMA CITY, OKLA., November 10, 1908.

Council met in adjourned session at 11 o'clock a. m. with the Mayor and following members present: Messrs. Highley, Workman, Helm, Corder, Peshek, McWilliams, McDavie, Land and Byers.

Moved by Mr. McDavie, seconded by Mr. Peshek that the council adjourn to meet November 11, 1908, at 8 o'clock p. m. to give the City Attorney further time in which to investigate the law in regard to Mr. Highley's motion to re-consider the awarding of contracts for asphalt paving. Motion carried.

#### EXHIBIT I.

##### *Minutes of Meeting of City Council, Nov. 11, 1908.*

We now offer in evidence extract from council proceedings found in council record No. 12 at page 251, under date of November 11, 1908:

OKLAHOMA CITY, OKLA., November 11, 1908.

Council met in adjourned session with the following members present. Messrs. Highley, Workman, Helm, Corder, Peshek, McWilliams, McDavie, Land and Byers, and Johnston; Mayor being absent Mont. F. Highley, President of the Council and acting Mayor, presided:

City Attorney Taylor gave verbal opinion—in regard to motion of Mr. Highley made at meeting of council November 9, 1909, "That the council re-consider action taken at meeting held November 4, 1908, in awarding contracts for asphalt paving." His opinion was that any time before the contracts are signed up by the city

and the contractor that the council had the right to rescind its action in awarding said contracts. Motion by Mr. McWilliams, seconded by Mr. Helm, that the opinion of the City attorney be received and placed on file. Motion carried (There being no opinion of the City Attorney to place on file, the only record of such opinion is the statement as above written. Clerk.)

Judge Burwell appeared before the council and spoke against the motion and Judge Harris spoke in favor of the same.

Motion as made by Mr. Highley as stated above carried by the following roll call vote: Ayes, Messrs. Highley, Workman, Helm, Corder, Johnston, Land; Nays: Messrs. Peshek, McWilliams, McDavid and Byers.

I offer in evidence also extract from council proceedings found in council record No. 12 at page 269;

Moved by Mr. McWilliams, seconded by Mr. Byers that Judge Burwell, be granted permission to address the Council. Motion carried.

Judge Burwell presented the eighteen contracts of David McCormick for paving different streets and demanded that they be accepted by the council.

\* \* \* \* \*

(Here follow copies of Exhibits J. K. L. and M. being Affidavits of R. E. Brownell, William W. Robinson and David McCormick, which are omitted for the reason that copies thereof appear at pages 108, et seq. of the original transcript.)

Mr. BURWELL: In order to be certain we have all the exhibits in complainant now offers in evidence Exhibits A to M, inclusive and exhibits 1 to 39 inclusive.

Thereupon Complainant Rests.

#### *Testimony for Defendants.*

Thereupon the defendants introduced the following testimony:

Mr. PAUL: The defendants offer in evidence extract from the proceedings of the city council of Oklahoma City found in Council Journal, No. 12 at page 251, commencing where Judge Burwell left off:

"Moved by Mr. Byers, seconded by Mr. McWilliams that the council do not consider any bids for asphalt paving to be let at this time based on the five year guaranty. Moved by Mr. Helm, seconded by Mr. Corder as a substitute for Mr. Byers' motion that the Council proceeded to award contracts to the lowest and best bidder for asphalt paving based on the five year guaranty. Substitute motion carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Peshek, Johnston, Land. Nays: Messrs. McWilliams, McDavie and Byers.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best bid for the paving of Second street from W. line of Western Ave. to E. Line of Blackwelder Ave. Oklahoma City, Okla. The bids were as follows:

## R. F. Conway Co.

Sh. Asphalt Pave inc. 5" Portland C. Con. Found 5 yr. guar. per sq. yd.....	\$1.95
Earth Excavation per cu. yd.....	.35
Str. Concrete curb and gut. 6" curb per lin. ft.....	.70
Rad. Concrete curb and gut. 6" curb per lin. ft.....	.75
Concrete Double gutter per lin. ft.....	.75
3" Oak header per lin. ft.....	.15
Vit. Pipe in place with back fill per lin. ft. 10" 60c.; 12" 80c.; 18" 1.55; 21" 1.75c.; 15" 1.00:	
Manholes complete each.....	40.00
Catch Basins at.....	20.00
Approx. total.....	\$22,276.25
David McCormick total.....	\$23,080.50
Barber Asp. Co.....	24,140.25

Moved by Mr. Corder seconded by Mr. Byers that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for paving the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Peshek, Johnston, Land and Byers. Nays: Messrs. McWilliams and McDavie.

Mr. BURWELL: We object to the introduction of that because incompetent, irrelevant and immaterial and in no way affecting the contract with complainant.

The COURT: Well, that is the question in the case; your objection can be noted and I will receive the evidence.

Mr. BURWELL: Will your Honor consider the objection to all that testimony?

The COURT: Yes, I will receive this evidence. You can make what objection you wish.

105 Mr. BURWELL: Your Honor received it subject to ruling upon it after investigation?

The COURT: Certainly.

Mr. PAUL: Without taking the time of the court to read all this, I will at this time state that the same record is made on each of the eighteen streets, paving contracts awarded to R. F. Conway pages 251 and 265, inclusive. We offer those in evidence.

Mr. PAUL: We also offer in evidence extract of council proceeding found in council journal No. 12 at page 270.

Mr. BURWELL: We also wish to object to the introduction of this evidence on page 270 because it pertains to the purported contract for the same work to David McCormick.

The COURT: Overruled.

Exception noted by complainant.

Mr. PAUL: (Reading from page 270).

"The contract and bond of the R. F. Conway Co. were read for the paving of 11th st. from W. line of A. T. & S. F. Ry. to E. line of Robinson; Dalve Ave. from N. line of Park Place to S. line of



13th st. Park Place from E. line of Broadway to E. line of Dale Ave. Oklahoma City. Moved by Mr. Highley, seconded by Mr. Land that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote except Messrs. McWilliams, McDavie and Byers voting No.

That record continues from page 270 to the bottom of page 274, being the same record with reference to the other streets involved in this litigation.

Mr. BURWELL: The same objection and ruling to all of it.

Mr. PAUL: We now offer in evidence the eighteen contracts tendered by David McCormick to the City of Oklahoma City on the 16th of November, 1908.

Mr. BURWELL: They may be admitted by agreement.

Mr. PAUL: We also offer in evidence at this time the rules of the City Council particularly rule No. 12 found at page 6 of the Revised Ordinances of the City of Oklahoma City.

Mr. BURWELL: We want to object to that until there is a showing that they have been adopted by the City Council, incompetent, irrelevant and immaterial.

The COURT: It ought to be shown that they are the Ordinances. I assume they are [objection] to the foundation.

106 Mr. PAUL: This is the published edition of the rules and ordinances of the City Council under the certificate of the clerk.

Mr. BURWELL: We are insisting that this rule never was adopted and we think they cannot show it.

(Ruling reserved.)

Mr. PAUL: I now offer in evidence the contracts and bonds of the R. F. Conway Co. with the City of Oklahoma City dated the 12th day of November, 1908, the approval of which I read from the records, covering this street and the other seventeen contracts of like character.

Mr. BURWELL: To the introduction of which counsel for complainant objects and to the introduction of each of these purported contracts objection is made for the reason they are incompetent, irrelevant, immaterial and in no way affect the right of the complainant in this case.

The COURT: Overruled.

Exception noted by complainant.

Exhibits marked Defendant's Exhibits

Thereupon W. C. BURKE, being first duly sworn, testified on behalf of the defendant, as follows:

Direct examination.

By Mr. PAUL:

Q. State your name to the court?

A. W. C. Burke.

Q. What official position do you hold in Oklahoma City?

A. City Engineer.

Q. Were you City engineer of this city during the month of November 1908?

A. Yes, sir.

Q. Continuously up to the present time?

A. Yes, sir.

Q. Are you familiar with the streets embraced in this controversy being eighteen streets, contracts for which were let to the Conway Company and alleged to have been let to McCormick?

A. Yes, sir.

Q. Did you prepare the plans and specifications for the construction of these streets?

A. Yes, sir.

Q. Has any work been done by any person on those streets since the 12th day of November, 1908?

A. Yes, sir.

Q. By whom?

A. By the Conway Company.

Q. Will you tell the court how much work has been done by the Conway Company on these eighteen streets up to the present time?

Mr. BURWELL: Objected to as incompetent, irrelevant, and immaterial in no way affects the rights of the parties hereto.

107 The COURT: Overruled.  
Exception noted by plaintiff.

A. Do you want the condition of each street?

Q. Yes, if you can give that?

A. Second street from Western to Blackwelder is all completed except the asphalt.

Q. What does that mean? What work has been done?

A. That is, the asphalt surface.

Q. What work is done prior to that time

A. Well, grading, sewers, catch basins, man-holes, concrete base, and curb and gutter is all in.

Mr. BURWELL: I understand I am having an exception to all this testimony without interrupting and repeating my objection every time. I want it to go to all these different streets.

The COURT: Well, state your objection.

Mr. BURWELL: Counsel here objects to any evidence showing any work was performed by the Conway Company for the reason that would be no defense to this action by complainant; incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

Exception noted.

Q. What was the contract price of that work for that street?

Mr. BURWELL: Objected to for the reason the record is the best evidence.

The COURT: Overruled.

Exception noted by complainant.

A. I would have to get hold of some other documents.

Q. You haven't got it there?

A. No, I have got what it amounts to in dollars and cents when it is completed.

Q. That is what I have reference to, when completed what is the contract price of the construction of Second street from the point to the point you have indicated?

Mr. BURWELL: Objected to for the reason, incompetent, irrelevant, immaterial, not the best evidence.

The COURT: Overruled.

Exception noted by complainant.

A. \$23558.25.

Q. Under whose direction is that work being performed?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial.

108 The COURT: Overruled.

Exception noted by complainant.

A. My direction.

Q. Who furnished the grading stakes and other details for the construction of this work?

A. I did.

Q. Proceed to the next street, tell the court how much work has been completed on the next street, if any?

A. Second street from Blackwelder to Ohio, grading, sewers, catch basins, manholes, concrete base and gutter and curb is all in.

Q. What is left to be done on that street?

A. Asphalt surface.

Q. What was the total contract price for the construction of the street?

A. \$22501.75.

Mr. BURWELL: We move to strike out all the testimony with reference to Second street for the reason incompetent, irrelevant, immaterial in no way constituting a defense to the action.

The COURT: Overruled.

Exception noted by complainant.

Q. In your judgment what would be the cost to complete that work? In other words, what would be the cost of the asphalt?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial.

The COURT: Overruled.

Exception noted by complainant.

A. I would have to consult the plans and see the yardage in order to make an intelligent reply to that.

Q. Can you even approximate it at this time?

Mr. BURWELL: We object to an approximate statement.

The COURT: Overruled.

Exception noted by complainant.

A. I would say one third of that amount would surface it.

Q. One third of the amount for surface?

A. Yes, sir.

Q. Turn to the next street involved in this litigation and tell us what work if any has been performed by the Conway Company under your direction?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial any work done by the Conway Company was done subsequent to the award of the contract to complainant.

The COURT: Overruled.

Exception noted by complainant.

109 A. Third street from the west line of Lee Ave. to the West line of Carey and Weaver's addition.

Q. What work remains to be done on that street if any?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial.

The COURT: Overruled.

Exception noted by complainant.

A. Grading, curb and gutter is in.

Q. What was the contract price?

A. \$2362.75.

Q. How much work has been done on that contract in dollars and cents, as near as you can judge?

A. I should think about \$800.00.

Q. Turn to the next street and tell how much work if any has been performed by the Conway Company?

A. Fifth street from the West line of Walker to the East line of Western Avenue.

Q. What work if any had been done on that street?

Mr. BURWELL: We object to any work done by Conway Company subsequent to the awarding of the contract to complainant as no defense to this action, incompetent, immaterial.

The COURT: Overruled.

Exception noted by complainant.

A. Sewer, curb and gutter and grading is completed.

Q. In dollars and cents what is that, the amount of work already done what does it amount to?

Mr. BURWELL: Same objection.

The COURT: Overruled.

Exception noted by complainant.

A. The final estimate of work to be done on that street was \$24196.00 and the amount of work done on that street is about \$7,000.00.

Q. Turn to the next street?

A. Sixth street from Robinson to Walker.

Q. What, if any, work has been performed by the Conway Company under its contract on that street?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial as to any work done subsequent to the awarding of the contract to the complainant, no defense to this action.

The COURT: Overruled.

Exception noted by complainant.

A. Grading, sewers, manholes, catch basins, and curb and gutter.  
Q. What was the final estimate of the cost of that street?

A. \$11677.00.

Q. Of that amount how much work has been performed in dollars and cents?

110 A. About \$3000.00.

Q. Take the next street, give a description of the street, and tell how much work, if any, has been performed by the Conway Company?

A. Sixth street from Walker to Lee; grading and curbing and gutter is in; final estimate amounts to \$7590.75; there is about \$2000.00 worth of work done.

Mr. BURWELL: We move to strike out the question and answer as incompetent, irrelevant, immaterial any work done by the Conway Co., being subsequent to the award of the contract to the plaintiff.

The COURT: Overruled.

Exception noted by complainant.

Q. Take the next street?

A. Sixth Street from Phillips to Kelley avenue.

Q. What work has the Conway Company performed under its contract on that street? How much?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial any work done by the Conway Company no defense to this action.

The COURT: Overruled.

Exception noted by complainant.

A. Grading, sewers, catch basins, manholes, curb and gutter and concrete base are in.

Q. What is the amount of work done?

A. The final estimate would be \$9389, and about \$6000.00 worth of work done.

Q. Take the next street?

A. Seventh Street from Stiles to Stonewall.

Q. What work, if any, has the Conway Company done on that street and how much?

Mr. BURWELL: Objected to as incompetent, immaterial, to any work done by the Conway Co. under an alleged contract awarded subsequent to plaintiff's contract, no defense to this action.

The COURT: Overruled.

Exception noted by plaintiff.

A. Grading, sewers, manholes, catch basins, curb and gutter, and concrete base is in; the final estimate would be \$31084.00 and the work completed amounts to about \$2200.00.

Q. The next street?

A. Ninth street from Dewey to Shartel, grading and curbing and gutter.

111 Q. What if any work has the Conway Company done on this street, how much in dollars and cents?

Mr. BURWELL: Objected to as above, incompetent, immaterial.

The COURT: Overruled.

Exception noted by complainant.

A. Grading, curbing and gutter is in; the final estimate would be \$8,388 and the amount of work done about \$2,000.

Q. What is the next street?

A. Sixteenth street from Shartel to McKinley.

Q. What if any work has the Conway Company done on that street and how much in dollars and cents?

A. Grading, sewers, catch basins, manholes, curb and gutter and concrete base; final estimate would be \$26,504.00; about \$17,000.00 worth are completed.

Q. Give us the next street?

A. Nineteenth street from Dewey to Western.

Q. What if any work has the Conway Company done on that street, and if so, how much in dollars and cents?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial any work done by the Conway Company under an alleged contract subsequent to the awarding of the contract to complainant and no defense to this action.

The COURT: Overruled.

Exception noted by complainant.

A. That street is completed.

Q. What was the final estimate of the cost?

A. \$19,703.00.

Q. By whom was it completed?

A. The Conway Company.

Q. Give us the next street?

A. The Classen Boulevard from 16th to 37th street.

Q. What if any work has been done on that street, give us the amount of it?

Mr. BURWELL: Objected to as incompetent, immaterial as to any work claimed to have been done by the Conway Co. under an alleged contract subsequent to the plaintiff's contract, no defense to this action.

The COURT: Overruled.

Exception noted by complainant.

A. There is part of the grading done, all of the sewers are in and part of the curb and gutter; the final estimate of that street would be \$147,498 and the amount of work done on that street would amount to about \$20,000 at the present time.

Q. Give us the next street?

A. California Ave. from Shartel to Western.

112 Q. What amount of work has the Conway people put on that street and if any, how much?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial and as above.

The COURT: Overruled.

Exception noted by complainant.



A. That street is completed by the Conway Company.

Q. What was the final estimate?

A. \$11,424.00.

Q. Give us the next street?

A. 18th Street from Dewey to Shartel; Dewey from the 17th to 19th and Lee from 17th to 19th.

Q. All that embraced in one contract?

A. Yes, sir.

Q. What, if any work, was done by the Conway Company on these three streets embraced in that contract, and if so, how much?

Mr. BURWELL: Objected to for the reason the work claimed to be done by the Conway Co. was under an alleged contract subsequent to the award of the contract to complainant and is no defense to this action incompetent, irrelevant, and immaterial.

The COURT: Overruled.

Exception noted by complainant.

A. Those streets are completed by the Conway Company.

Q. What was the final estimate of the cost?

A. \$19,487.00.

Q. Give us the next street?

A. The next street is Walker Ave. from 13th to 16th.

Q. What if any work has the Conway Company done on this street? If any, how much?

Mr. BURWELL: Objected to for the reason any work claimed to be done by the Conway Company was under an alleged contract subsequent to the award of the contract by the city council to the complainant and is no defense in this case; incompetent, immaterial, irrelevant.

The COURT: Overruled.

Exception noted by complainant.

A. The street is completed.

Q. What was the final estimate of the cost?

A. \$8,588.00.

Q. What was the next street?

A. Washington avenue from Broadway to Robinson.

Q. What if any work has the Conway Company performed on that street? If any, how much?

Mr. BURWELL: Objected to for reason that work claimed to be done by the Conway Company under an alleged contract subsequent to the awarding of the contract to the complainant is no defense to this action; incompetent, irrelevant and immaterial.

The COURT: Overruled.

Exception noted:

A. The street is completed.

Q. What was the final estimate of cost?

A. \$3,220.00.

Q. What is the next street?

A. Washington from Robinson to Walker.

Q. Any work been performed by the Conway Company on that street?

Mr. BURWELL: Same objection as above.

The COURT: Overruled.

Exception noted by complainant.

A. Yes, sir.

Q. Is the street completed?

A. Yes, sir.

Q. What was the final estimate of cost?

A. \$11,285.00.

Q. What was the final estimate of cost?

A. \$11,285.00.

Q. What was the next street?

A. Phillips avenue from 4th to 10th.

Q. What if any work has the Conway Company performed on this street?

Mr. BURWELL: Objected to for the same reason.

The COURT: Overruled.

Exception noted by complainant.

A. Grading, sewers, manholes, catch basins, curb and gutter and concrete base is in.

Q. What is the final estimate of the cost and how much work has been done by the Conway Co.

A. The Final estimate would be \$16,334.00 and the amount of work done would be about \$12,000.

Q. Any other streets now of this eighteen?

A. No, sir.

Mr. BURWELL: Defendant moves to strike out all the testimony of this witness pertaining to work claimed to be done on these streets and the estimates of cost of the work already constructed, for the reason if made at all it was made under a contract subsequent to the awarding of the contract to the complainant for these particular improvements, and no defense to this action; incompetent, irrelevant and immaterial.

The COURT: Overruled.

Exception noted by complainant.

Q. Mr. Burke, do you know when the Conway Company commenced work, constructing these streets?

114 Mr. BURWELL: Objected to for the reason any work done by the Conway Co., was under a pretended contract entered into subsequent to the award of the contract to this complainant, and no defense to this action, incompetent, immaterial.

The COURT: Overruled.

Exception noted by complainant.

A. About the 15th of November?

Q. Are they still at work?

A. Yes, sir.

Q. Do you know how many men they have employed here in the construction of this work?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial no defense to this action.

The COURT: Overruled.

Exception noted by complainant.

A. My record shows about 700 men.

Q. Know what machinery, if any, they have here in the construction of this work?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial as to any work performed under an alleged contract subsequent to the award of the contract to complainant, being no defense here.

The COURT: Overruled.

Exception noted by complainant.

A. They have two large asphalt plants; three concrete mixers; three steam rollers and all the tools that naturally go with that class of work; asphalt wagons, rock wagons, teams, such things as that; of course, they hire a great many of the teams; they have some of their own, however.

Q. You are acquainted with David McCormick?

A. Yes, sir.

Q. I will ask you what if any grade stakes or other things you have given him for the purpose of constructing any of these eighteen streets?

A. None.

Q. Can you tell the court what the average daily expense of conducting this work is to the City and the Conway Company?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial and no defense to this action.

The COURT: Overruled.

Exception noted by complainant.

A. The labor account is approximately about \$2,000 a day, I should judge, and the amount of material they use daily in the way of rock, sand, cement, asphalt. I think about \$1,800 or \$2,000 worth of material a day.

115 Q. You, of course, inspect all the material they use in the construction of these streets?

A. Yes, sir.

Q. Are you familiar with the amount of material the Conway Company has on hand at this time for the purpose of constructing these streets?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial and no defence to this action.

The COURT: Overruled.

Exception noted by complainant.

A. I believe they have enough material on hand to complete all these contracts.

Q. In dollars and cents what would that amount to, in your best judgment, of course?

A. You are speaking now of the material on hand?

Q. Yes, sir.

A. I would say \$40,000.00.

Q. What effect does the incomplete condition of these streets you have testified concerning have upon the travel with reference to being open or closed for travel?

A. Well, when we turn a street over to the contractor he has possession of that street and he is responsible for it.

Q. During the process of construction are these streets open for travel?

A. No, sir, they are barricaded.

Q. Were there very much traveled streets or otherwise those that are closed at this time?

Mr. BURWELL: Objected to as calling for conclusion, not statement of fact.

The COURT: Overruled.

Exception noted.

A. Oh, they are all travelled more or less, some of them more than others.

Cross-examination.

By Mr. BURWELL:

Q. Mr. Burke, you say that you never furnished any grade stakes to David McCormick for the doing of any of this work, on any of these eighteen streets, Mr. McCormick told you he wanted grade stakes and expected to carry out his contract didn't he?

A. No, sir.

Q. Did he never talk to you about grade stakes or things of that kind?

A. No, sir.

Q. You are sure of that?

A. Yes, sir, I am sure of it.

116 Q. Were you present in the City Engineer's office when Mr. McCormick personally spoke to those in charge with reference to grade stakes?

A. No, sir.

Q. You were not?

A. No sir.

Q. You don't say that was not done but you don't know of it?

Mr. CHAMBERS: We object to that.

The COURT: Overruled.

A. I could not answer what he said to others: I said he didn't say it to me.

Q. You say there are about seven hundred men at work at this time on these streets?

A. Yes, sir.

Q. If the work were to cease they would be relieved from employ-

ment and the Conway Company would not suffer by reason of having to pay these men?

Mr. PAUL: We object as asking for conclusion, not statement of fact.

The COURT: Sustained.

Q. Are you acquainted with the custom of construction companies with reference to whether or not they pay their employees when not actually employed on the work?

A. There is lots of them that are paid regularly whether employed or not.

Q. Are the ordinary laborers paid?

Mr. PAUL: Objected to as incompetent, irrelevant and immaterial.

The COURT: Overruled.

Exception noted by defendant.

A. Some of them are; it depends on circumstances. Now I cannot testify from absolute personal knowledge in this particular case but before there was any litigation or any question about expense or anything like that came up, I was informed by the Conway Company manager or superintendent, that a certain number of the men he brought from Chicago which he calls his expert finishers, which are really laborers but experts at their particular vocation, they get regular full time whether they work or not.

Q. How many of those are there employed at this time?

A. I should judge of that class there is possibly one-third of his concrete forces.

Q. How many are there on the concrete forces?

A. I think about 75 or 80 men on the three gangs.

Q. And one third would be about twenty-five men?

A. Yes, sir.

117 Q. What do all these other men do?

A. Now at the asphalt plant, there are quite a number of men there that are monthly men, in fact hired men about all the time, so I am informed.

Q. You don't know about that?

A. No, sir, so I was informed. Understand now, I don't know to my own personal knowledge that how these other men are paid except what I have been told about it.

Q. You do know and isn't it a fact that these construction companies doing paving work hire quite a number of other men who when paid off do not receive pay?

A. Yes, sir, just common men.

Q. That is what I say, common ordinary laborers?

A. Yes, sir.

Q. Now the material which is consumed upon the work from day to day that would not be lost, that would keep——

A. They have lots of that material delivered on these different streets in advance of the machines.

Q. How long in advance?

A. Sometimes a couple of weeks.

Q. Well, that is gravel?

A. That is rock and sand.

Q. That would not be destroyed by delay?

A. Well to a certain extent. They might be to the cost of taking it off again.

Q. But the material itself would not be destroyed by any delay?

A. It depends on how much it was delayed. You take a sand pile and let it stand there six months, there would not be any sand there then.

Q. It could be removed all right?

A. It might have laid there but not any six months.

Q. That is a fact. It was removed immediately after stopping work?

A. Yes, sir.

Q. You say they have their appliances here for doing paving work, they have other contracts amounting to over \$300,000 in this city. the Conway Company at this time beside these eighteen contracts?

A. They have their contracts, yes, sir.

Q. You are furnishing grade stakes for those?

A. Yes, sir.

Q. This entire force could be employed upon that improvement?

A. A great many of those streets are open.

Q. A great many are not open?

A. Some that are not.

[A.] They receive something like \$500.00 [work] of work other than involved here?

A. \$400,000.

Q. That work has not been commenced?

A. Has not been started, no sir.

118 Q. Then there was something over \$200,000 in addition to that they received about the same time they began work on these particular contracts in fact, before that?

A. Yes, sir, their contract—that is the first contract, there is no question about, I think amounted to \$225,000.

Q. This entire force which they have could be used on these streets that are not completed if this work was stopped, couldn't they?

A. No, sir.

Q. Could not be?

A. No, sir.

Q. Why?

A. You could not put them on there, would not be room to put them all on. In the first place, you have got to grade the street; then you follow it up with the sewers, then follow the concrete with your asphalt; Now if they open up the new contracts, the first thing they would do would be to put on the grading—utilize the grading forces.

Q. Let me ask you this, if they were to cease work on these eighteen contracts they could change on to other work without any difficulty except they would be required to discharge some of the men in their employ, cut down some of the force, isn't that true?

A. They would have to reduce their force, yes, sir.

Q. But they could go right ahead and complete these contracts; that would be the only trouble?

A. I want to make that clear. Now quite a large per cent of all the streets not in controversy, in fact 90% of the streets not in controversy are already completed or just ready for asphalt, so that the only forces that could work on the streets that are not in controversy would be simply the asphalt forces.

Q. You are not including in that the \$40,000 contract awarded the other night?

A. No, sir.

Q. At the time these contracts were awarded to David McCormick by the City Council, he had all appliances and machinery here to go ahead and do this work didn't he?

A. No, sir.

Q. Didn't he have an asphalt plant?

A. Yes, sir, he had an asphalt plant.

Q. He had other machinery here?

A. No, sir.

Q. Didn't he have shovels?

A. He might have had a few shovels or picks?

Q. And tools, picks, all that sort of things?

A. No, sir, I saw he didn't have them here. He finished the 8th street paving in October and he had to borrow some tools in order to finish that.

Q. At the time these contracts were awarded to David McCormick, isn't it a fact he had more machinery and plants here to do that work than the Conway Company people had?

119 A. The Conway people didn't have any at that time.

Q. None at that time?

A. No, sir.

Q. Didn't have until after this whole matter was disposed of by the City Council?

A. No.

Q. Didn't have until after suit was filed in the District Court to enjoin them from doing that work?

A. It was sometime about the first of December, when they got their outfit here, that is all their appliances that go with the paving work.

Q. You remember the meeting of the City Council at which Mr. Burwell appeared and addressed the City council protesting against the reconsidering of the David McCormick award do you not?

A. Yes, sir.

Q. At that time, Mr. McCarthy, the manager of the Conway people was present?

A. Yes, sir.

Q. He knew all about the claim of Mr. McCormick he had a contract for the paving of these streets?

Mr. PAUL: Objected to as incompetent, irrelevant, immaterial, asking for conclusion; the record is the best evidence.

The Court: Sustained.

Q. Isn't it a fact that McCarthy was present in the council chamber that evening and heard all these proceedings?



A. He was in the council room that evening; whether he was there at that particular time when you addressed the council I could not say for certain.

Q. He was there about the council chamber all evening?

A. Yes, sir.

Q. Would it have been possible for him to have been in and out of the council chamber that evening and not have known this matter was being considered?

Mr. PAUL: Objected to as incompetent, immaterial.

The COURT: Overruled.

A. That is rather a hard question to ask. I was there very busy at the time. I could not tell who was in the council chamber.

Q. I asked the question if it would have been possible for him to be in and out of that council chamber that evening and not know this matter was being considered there?

A. I don't think there was any question but what he knew there was a controversy about this paving, and you addressed the Council, I don't think there could be any question about that.

Q. I was claiming the award was to David McCormick?

120 A. Yes, sir.

Q. During that time and before the award made to David McCormick was reconsidered by the council, did you talk with Mr. McCarthy about it?

A. Yes, sir. I talked to everybody, talked to Mr. McCormick, Mr. King, Mr. McCarthy, Mr. Bell.

Q. Did you talk with Mr. McCarthy as to whether the award to McCormick constituted a contract for that work?

Mr. PAUL: Objected to as incompetent, irrelevant, immaterial.

The COURT: Overruled.

Exception noted by defendant.

A. I don't know that I did, I have no recollection of it.

Q. You say you were present in the council chamber when Mr. Burwell addressed the council he appeared there on two different occasions, didn't he?

A. I believe he did.

Q. Did you hear Mr. Burwell state to the Mayor and the council, or the President of the Council as the case might be, whoever was in charge of the City council—the city council was in regular session at that time was it not?

A. Yes, sir.

Q. Did you hear Mr. Burwell state to the Mayor and council on that occasion that he had there eighteen contracts for these particular improvements and demanded that they be executed by the Mayor on behalf of the City and the proper officers of the city, and if they were not in form, they would make them complete and file plans and specifications if they were awarded the contracts by the council?

Mr. PAUL: We object to that as incompetent, irrelevant, immaterial; the record is the best evidence.

The COURT: Overruled.

A. I don't remember, I think you did though.

Q. I will ask you to refresh your memory and see if you don't remember that?

A. There was so much said and occupied so much time there, it is pretty hard to remember what was said. It seems to me I have a vague recollection you did mention about having the contracts ready to tender and asked that they be executed.

Q. Didn't Mr. Burwell on that occasion or on a subsequent occasion state to the Mayor and council that Mr. McCormick would insist on these awards and would take such legal measures as would be necessary to protect his interest?

A. Yes, sir, I heard that.

121 Q. That occurred while the council was in regular session?

A. Yes, sir.

Redirect examination.

By Mr. PAUL:

Q. At the time these contracts were awarded did Mr. McCormick have a plant here for the purpose of finishing up some work or was the plant idle?

A. It was idle.

Q. How long had it been idle?

A. I think from the middle of October.

Q. It is still idle?

A. Yes, sir.

Q. Do you know to whom the plant belongs?

A. Supposed to belong to the Parker Washington Company.

Mr. BURWELL: Objected to as incompetent, immaterial, conclusion of witness.

The COURT: Sustained.

Q. Do you know of your own knowledge to whom that plant belongs?

A. No, sir.

Q. Do you know by whom it was used in the work on 8th street?

A. By the Parker Washington Paving Company.

Q. Know what if any signs or statements appear on that plant as to the ownership of it?

A. The name of Parker Washington appears on the side of the plant.

Q. Mr. McCormick was president of the Parker Washington Company?

A. Yes, sir.

Q. These bids were made by him in his individual name were they not?

A. In the name of David McCormick, yes, sir.

Q. At the time that Judge Burwell appeared before the council was it not after the council had reconsidered its action in awarding the contracts on a ten year basis and determined to award them to the lowest bidder on a five year basis?

A. That was the time, it was at that meeting.

Q. After you had reported that the Conway Company was the lowest on five year guaranty?

A. Well, the proceedings in the council were about as follows: After the council convened and by motion adopted the five year guaranty, then motion was made to award the contract to the lowest and best bidder on the five year guaranty; I was called upon then to give the figures and I read the streets in their regular order, and the question would be asked, as I would say for instance, Second street—this is the street I read from—Second street from 122 the west line of Western to the East line of Blackwelder; Conway \$22276; McCormick \$23080; Barber \$24140. I would announce that the Conway was the low bidder; then motion would be made to award the contract to Conway for that particular street; then vote would follow.

Q. After that was done Judge Burwell, as I understand you, appeared there and tendered the contracts to the city and made the announcement he proposed to carry out the terms of the contract?

A. He appeared then but whether he tendered the contracts prior to the reading or close after I am not prepared to say.

Recross-examination.

By Mr. BURWELL:

Q. Isn't it a fact that Mr. Burwell appeared there before the council before those bids were read for reconsideration and protested against the council—reconsidering the award of David McCormick?

A. It was at that meeting.

Q. Did Mr. Burwell appear before the motion to reconsider the award was voted upon or afterwards?

A. I could not say.

Q. I will ask you to refresh your memory and see if you cannot recollect that Mr. Burwell addressed the council protesting against the reconsideration of that bid and that Mr. Harris urged its reconsideration before the awards were made to the Conway people?

A. Well, I don't remember; I think you did; I think it was prior to the actual awarding.

Q. Then after they reconsidered it and voted to reject the ten year bids, then it was that they adopted the five year bids and you read those streets and those were then awarded to the other persons?

A. I cannot recollect the exact procedure when the council convened.

Q. The record has already been introduced upon that?

A. Yes, sir, I would rather rely upon the record. I think it was at that meeting you addressed the council but exactly at what point in the meeting you addressed them, I am not clear, yet I would think it was prior to the awarding.

Q. Prior to the time of the reconsideration of this bid, Mr. Burwell stated to the council that David McCormick would pursue whatever legal remedies he had to enforce his rights?

A. It was at that meeting but exactly what time you addressed them or made that statement to the council, I am not prepared to say.

Q. To refresh your memory don't you remember that these proceedings were all had and then while you were reading the streets and the city council were passing upon, that Mr. Burwell, and the other persons who had addressed the council retired from the council chamber and you finished the awarding of these contracts the second award, after they had left the council chamber?

A. That may be true, yes, sir.

Q. To refresh your memory—

A. I am testifying exactly what I believe—it was at that meeting but as to what time of the state of the meeting, I am not prepared to say, I wasn't interested in any way.

Q. You say you did report at the former meetings that McCormick was the lowest bidder on all these eighteen awards?

Mr. PAUL: We object to that, the record is the best evidence.

The COURT: Overruled.

A. When the award was made on the ten year guaranty, I read all just the same manner in which I read these.

Q. The awards were made upon that basis?

A. Whoever was low man on the ten year basis was read to the council and award was made in that manner.

Q. You say the Parker Washington Machinery is idle at the present time?

A. Yes, sir.

Q. The Parker Washington Company was the low bidder on these \$40,000 worth of work awarded a few days ago, wasn't it?

Mr. PAUL: Objected to as incompetent, immaterial.  
(Question withdrawn by counsel.)

Redirect examination.

By Mr. PAUL:

Q. Do you remember when this law suit was tried here in the District Court on the 3rd day of December?

A. Yes, sir.

Q. Have you seen Mr. McCormick from that day to this?

A. Yes, sir.

Q. Frequently or otherwise?

A. A couple of times I think.

Q. Do you know of your own knowledge whether he knew the Conway Company was at work on these streets?

A. I don't see how he could help know it.

Mr. BURWELL: Move to strike out the answer.

The COURT: Overruled.

Exception noted by complainant.

Thereupon the Witness was excused and

JOHN J. MCCARTHY, having been first duly sworn, testified on behalf of the defendant, as follows:

124 Direct examination.

By Mr. PAUL:

Q. State your name to the court?

A. John J. McCarthy.

Q. What position if any do you hold with the R. F. Conway Company?

A. Secretary.

Q. The R. F. Conway Company constructed this work Mr. Burke has testified to?

A. Yes, sir.

Q. What material if any have you on hand at this time?

Mr. BURWELL: Objected to as incompetent, immaterial, if work is being done by the Conway Company it is under an alleged contract subsequent to the award of the contract to David McCormick, no defense to this action.

The COURT: Overruled.

Exception noted by complainant.

A. Practically all the material.

Q. With reference to these eighteen streets in controversy have you all the material on hand necessary for the purpose of constructing and completing all these streets?

A. Practically all.

Mr. BURWELL: Objected to as no defense to this action.

The COURT: Overruled.

Exception noted by complainant.

Q. What if any loss would you sustain by reason of the stopping of the work at this time, if you know?

Mr. BURWELL: Objected to as calling for conclusion, not statement of fact, incompetent, irrelevant, immaterial, no defense to this action.

The COURT: Overruled.

Exception noted by complainant.

A. We are completing about \$6000.00 worth of work a day at the present time. We have all our machinery, all our organization here; we expect to finish this work in a specified time to enable us to move our machinery and organization elsewhere and let that be stopped it would cost us a great deal of damage.

Mr. BURWELL: Move to strike out the last of the answer not a statement of fact.

The COURT: Overruled.

Exception noted by complainant.

Q. Can you estimate the amount of it?

A. About \$2500 a day.

Mr. BURWELL: Move to strike out the answer as not based on any statement of fact, as a conclusion.

The COURT: Sustained.

125 Q. Just specify in what manner you would sustain loss and the amount of it?

Mr. BURWELL: Objected to for the reason any work done by the Conway Company, any loss they might be put to, is due to a condition arising under an alleged contract subsequent to the award of the work to David McCormick, and is no defense to this action; incompetent, immaterial.

The COURT: Overruled.

Exception noted by complainant.

A. Our plant would be idle; our whole organization would be idle; we would be prevented from executing other contracts which we should have done if we proceeded with this work without interruption.

Q. To what state has this work on the eighteen contracts involved in this litigation reached?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, no defense to this action.

The COURT: Overruled.

Exception noted by complainant.

A. Towards final completion.

Mr. BURWELL: Move to strike out the answer.

The COURT: Overruled.

Exception noted by complainant.

A. We have completed some and practically have completed others.

Q. Just explain to the court the best you can the details of your damage and the amount thereof by reason of the stopping of the work?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, no defense to this action, the work being done if at all under a contract subsequent to the award of the contract to David McCormick for this particular work.

The COURT: Overruled.

Exception noted by complainant.

A. We have purchased our material, we have a great majority of the material on the streets for which we paid for not only for the material itself but for hauling and labor of putting it on the streets. As I have said we have all our machinery here, at least the implements peculiar in construction work; they would have to remain here while this thing is in litigation, that would be a great loss to us. Our material standing on the corners as it is now would be spoiled; the sand mixed up with dirt; we would be prevented from taking other contracts to complete while this is in litigation because we have only a limited time in which to do much work. This is the best season at the present time to work in Oklahoma. If we wait until April or May we strike the

rainy season. This — very expensive to us because we have a great organization here.

Q. What would that expense be, loss sustained, by reason of the stopping of the work, in dollars and cents?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, no defense to this action.

The COURT: Overruled.

Exception noted by complainant.

A. Well, \$2500 a day.

Cross-examination.

By Mr. BURWELL:

Q. Is this \$2500 a day just for labor alone?

A. No, sir.

Q. What does that include?

A. That includes contracts I have for material, material on hand, the money I have got invested, the men I have got here.

Q. You are taking into account what you estimate would be reasonable compensation for the tying up of your machinery and also what material you would use per day in the construction of the work and all that?

A. And the money I have got in the work.

Q. You take into consideration all that?

A. I take everything into consideration, yes, sir.

Q. The material, however, would not be lost if you were delayed if removed at once, would it?

A. The material, would be a loss.

Q. It could be removed at once?

A. Yes, sir, if we had the men and teams.

Q. At the time of awarding these contracts you were here in person?

A. Yes, sir.

Q. You were here when the award was first made to David McCormick?

A. I was.

Q. For all this work you knew that the City Council had awarded the paving for all these eighteen streets to David McCormick?

A. I did.

Q. After the award was made to David McCormick you for the Conway Company draw down your certified checks for sixteen of these same streets?

A. I don't think that is the fact.

Q. Isn't it a fact that the Conway Company checks were drawn off, the certified checks?

A. Might have been I don't remember.

Q. Have you the information either with you or at your command whereby you could determine that?

A. No.

127 Q. Could you ascertain at your office?

A. I can.



Q. I wish you would ascertain. After motion was made in the city council to reconsider the David McCormick award, you employed counsel to appear before the city council to urge the reconsideration of that bid, didn't you?

Mr. PAUL: Objected to as incompetent, immaterial.

The COURT: Overruled.

Exception noted by complainant.

A. We employed counsel to assist the City Attorney to see whether that thing could be done or not.

Q. Wasn't it part of the employment of that attorney that he should appear before the City Council to address the council and urge the reconsideration of that bid?

A. Instruct the council on the law in regard to it.

Q. You were not interested in reopening that subject except in so far as it might bring about a reconsideration of the award, were you?

A. That is right.

Q. You hoped to profit by a reconsideration of the award?

A. I expected to.

Q. Looking at that matter you employed Mr. Harris to appear before the City Council and address the city council and advise them to reconsider the award to David McCormick for these eighteen contracts, and that they had a right to reconsider it?

A. I employed him to assist, as I said before, Mr. Taylor in regard to the law.

Q. You employed him because he had expressed to you that the city council had the right to reconsider the bid?

A. Yes, sir, he did express it to me.

Q. He did express it to you in that way?

A. Yes, sir.

Q. With the object in view and in the hope that the city council might be induced to reconsider the award you employed him to appear before the city council?

Mr. PAUL: Objected to as incompetent, immaterial.

The COURT: Overruled.

A. I had several opinions on that.

Q. I am asking you about the proposition of employing Mr. Harris. That is true, isn't it?

A. That is true.

Q. When motion came up for re-consideration of awards in the city council you were personally present?

A. I was.

Q. You heard all the proceedings there that evening?

A. I did.

128 Q. You were present when Mr. Burwell asked permission of the city council to be heard upon the question as to whether or not the council had a right to re-consider those awards?

A. Yes, sir.

Q. At that time you heard Mr. Burwell state to the council that

Mr. McCormick would insist on his legal rights to enforce these contracts as he contended they were?

A. No, I did not remember of hearing you say that.

Q. You don't remember?

A. I don't remember that.

Q. Have you any recollection—can you refresh your memory as to that?

A. I am positive I don't remember it.

Q. You could not remember it?

A. I can't remember of hearing you say that: I remember you said the council had no right to reconsider their action; that was your argument that is all I remember now.

Q. Didn't Mr. Burwell just before he sat down on that occasion state to the council that Mr. McCormick would insist upon his legal rights and enforce the contract if it was possible to do it?

A. I don't remember it.

Q. Mr. Harris appeared before the council at that time?

A. Yes, sir.

Q. He advised the council that they had a right to reconsider?

A. Yes, sir.

Q. After Mr. Harris and Mr. Burwell had spoken to the council, then they took a vote upon the reconsideration of it and reconsidered it?

A. Yes, sir.

Q. Now you were present when it was reconsidered?

A. Yes, sir.

Q. After the council had re-considered the vote and rejected all ten years bids, and awarded that work to the Conway Company on the five year guaranty, action was filed in the District Court to enjoin the city council from approving any contract to you, wasn't it?

A. Yes, sir.

Mr. PAUL: Objected to as incompetent, immaterial, not the best evidence.

The COURT: Overruled.

Exception noted by complainant.

Q. That was immediately after the awarding of the contracts to have completed the work which was awarded to you on the pre-

A. Sometime, I don't know exactly how many days.

Q. It was before you had brought any machinery anything of the sort here to do that work with?

A. No sir.

Q. What machinery had you here?

129 A. Curb and gutter tools, starting on the early work and curb and gutter.

Q. Isn't it true that suit was filed before the contracts of the Conway Company were approved by the city council?

A. Yes, sir.

Q. And before the bond was approved?

A. I think suit was filed the night they were approving the bonds, you enjoined them from accepting the bonds or the contracts.

Q. You would have brought your machinery here and did that to have completed the work which was awarded to you on the previous awarding if you had not gotten these eighteen contracts, wouldn't you?

Mr. PAUL: Objected to as incompetent, immaterial, asking for conclusion.

The COURT: Overruled.

Exception noted by defendant.

A. We would not have brought as much as we have got here.

Q. You would have brought some machinery?

A. Yes, sir, some machinery.

Q. After suit was filed in the District Court you knew of it immediately?

A. Yes, sir.

Q. You have known of the pendency of that suit ever since?

A. I was informed it was dismissed in the court down here and we started on the work on all these streets.

Q. You didn't mean dismissed did you?

A. I was so informed.

Q. You simply mean on demurrer here the injunction was denied?

A. The injunction was denied; the council accepted the bonds, approved our bonds and the contracts after the acceptance of the bonds, the contracts were signed, and we proceeded with this work; that was in December.

Q. You knew of all these proceedings as they occurred at that time?

A. Yes, sir.

Q. What was the total amount of these eighteen contracts?

A. About \$425,000 something like that.

Q. What will your profits be on that work?

A. I don't know.

Q. What is the actual cost per yard for paving?

A. I don't know.

Q. How long have you been engaged in the paving business.

A. About twelve years.

130 Q. Are you able to state approximately the cost per yard for paving?

Mr. CHAMBERS: Objected to as incompetent, irrelevant, immaterial.

The COURT: Overruled.

Exception noted by defendant.

A. No.

Q. Can you estimate, give the reasonable estimate of the cost of the construction of these improvements on these eighteen streets?

Mr. CHAMBERS: Objected to as incompetent, irrelevant, immaterial.

The COURT: Overruled.

A. I cannot answer that yes or no.

Q. Can you give a reasonably correct estimate?

A. I can guess at it.

Q. I don't want you to guess. Is there any way by which you can give a reasonably accurate estimate of what it would cost to construct that without getting the itemized statements of expenses, then determining that fact?

A. No, I have to have the itemized statements.

Q. There is no way of determining without those?

A. No, sir.

Q. That can only be determined after the work is completed?

A. Yes, sir.

Q. There is no way in your judgment of determining what the profits would be then to take the itemized statements and determine from them?

A. Yes, sir. That is the way we ascertain our profits after the completion of the work.

Q. It would indeed be very difficult to make any estimate which would be reasonably accurate of the profits on that work until after it is completed, then take the statement of the actual expenditures and determine from those?

A. If you have all the details then possibly you can figure it; otherwise you guess at it.

Thereupon the witness was excused and a recess was taken until two o'clock of this day at which time the further hearing was continued as follows:

Thereupon GEORGE HESS, being first duly sworn, testified on behalf of the defendants as follows:

Direct examination.

By Mr. PAUL:

Q. State your name to the court?

A. George Hess.

131 Q. What official position do you occupy in Oklahoma City?

A. City Clerk.

Q. How long have you been such City Clerk?

A. Since April 1905.

Q. As such City Clerk have you the custody and control of the records of the City Clerk's Office, particularly the council journals and resolutions, various resolutions, passed by the city council and ordinances books?

A. Yes, sir.

Q. Have you in your possession the resolution of the city council authorizing the revision of ordinances?

A. Yes, sir, I have.

Q. Is that the original resolution?

A. Yes, sir.

Mr. PAUL: We offer in evidence the resolution as defendant's exhibit 70 which exhibit is in words and figures as follows, to-wit:

*Resolution No. —.*

Whereas by virtue of Section 465, of Wilson's Revised Statutes of Oklahoma, 1903 "The Council may from time to time authorize the revision of the city ordinances and their publication in pamphlet form and may cause to be published in connection therewith the laws relating to cities of the first class and such forms and instructions as they may deem advisable" and

Whereas public necessity demands that the ordinance- of the city of Oklahoma City as now in force and amended from time to time be revised and published in pamphlet form, and

Whereas it is necessary to employ some person to revise the said ordinances and cause the same to be published. Therefore

Be It Resolved by the Mayor and Councilmen of the City of Oklahoma City, Oklahoma County, Territory of Oklahoma,

First. That the Mayor of the City of Oklahoma City is hereby authorized and empowered to employ some competent person to revise the said ordinances of the City of Oklahoma City submitting to the council the necessary ordinances or amendments, to alter or eliminate all useless or inconsistent matter, at a compensation not to exceed \$200 for said work, and when so revised and compiled reported back to the council for further action.

Passed by the City Council this 2nd day of June, 1905, and approved by the Mayor this 2nd day of June, 1905.

[SEAL.]

J. F. MESSENBAUGH.

132

Attest:

GEO. HESS, *City Clerk.*

Marked on back: Filed May 8, 1905. George Hess, City Clerk.  
Recommended: J. H. Johnston.

Q. Mr. Hess, do you know whether or not you signed the original certificate, copy of which appears at page 244 of the revised ordinance book?

A. Yes, sir.

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, not the best evidence.

The COURT: Overruled. Exception noted.

Q. Do you know what became of it?

A. I never saw it since the printer brought it to me, to read the proof over; I don't know whether he kept it or not.

Q. Have you made search for it today?

A. Yes, sir.

Q. Been able to find it?

A. No, sir.

Q. What search did you make?

A. I looked through the files for years and could not find it.

Q. Did you endeavor to find it?

A. I have tried to find it for some time past.

Q. What record have you there in your possession?

A. Council Journal No. 2.

Q. I wish you would turn to page 69 of that journal and see whether or not there is any minutes on that journal pertaining to the adoption of the rules governing the business of the city council?

A. Yes, sir.

Q. I wish you would read that portion of it which relates to that subject?

A. "April 12, 1892. Moved and seconded that a committee be appointed to draft a set of rules and report at the next meeting of the council, Committee, Jones, Kitchens, and Dunn."

Q. I wish you would not turn to page 72 of that record and state what if any report was made?

A. "April 25, 1892, was the next meeting. It was moved and seconded that rules of business be adopted. Vote of the council resulted as follows: Ayes: Button, Dunn, Staley, McNabb, Mendlich, Jones, Ross, Ketchins.

Q. Have you been in attendance on the city council during your four years as such city clerk?

A. Yes, sir.

Q. Have you made search of your office for the original rules that were prepared and filed by that committee as that appear of record?

A. Yes, sir.

Q. Have you been able to find them?

A. No, sir.

133 Q. Are you familiar with the rules of the city council under which business is transacted?

A. Fairly familiar with them.

Q. I will ask you to look at pages 5, 6 and 7, of the Revised Ordinance book of Oklahoma City, which I now hand you and state to the court whether or not you know of your own knowledge that those are the rules under which the council worked during all the time you have been such clerk?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, not shown that those rules have been adopted as provided by law by the city council of Oklahoma City.

The COURT: Overruled.

Exception noted by complainant.

A. Yes, sir.

Q. Mr. Hess, as city clerk have you ever had any experience in the execution of contracts for paving?

A. Yes, sir.

Q. How many contracts have you executed of that character if you know?

A. I could not state exactly, over a hundred, though.

Q. How many contracts have been executed between the City

and the paving Contractor during your four years as such clerk that have not been revised before written out and signed by you and the Mayor of the City?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, has no influence upon the contract in question, no defense in this action.

The COURT: Overruled.

Exception noted by complainant.

A. Has not been any.

Q. Have you executed any contract with the Parker Washington Company or David McCormick other than formal written contracts for paving work?

A. No, sir.

Q. What is the custom of the city council with reference to the formalities of entering into these contracts after the acceptance of bids?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, the custom of the city would be no defense to this action.

The COURT: Overruled.

Exception noted by complainant.

A. The custom has been in the last four years; after the bid is accepted the city attorney is instructed to prepare a contract and the company signs or fills the necessary bonds and presents them to the council with the contract; then if they are approved the council instructs the mayor and clerk to execute them and place them on file.

#### 134 Cross-examination.

By Mr. BURWELL:

Q. Mr. Hess, how many contracts do you say have been let for public improvements since you have been city clerk?

A. I say I don't know exactly.

Q. Well approximately?

A. I said there was over one hundred.

Q. Did you ever send to any of these contractors any written notice that the contracts had been awarded to them?

A. No, sir.

Q. You have no record in your office showing the adoption of any particular rule of the council which sets out the rules that were actually adopted?

A. That is the only one I have been able to find.

Q. That is only a record that certain rules were adopted; you have nothing in your office to show what they were?

A. Not now that I can find.

Q. You were present in the city council chamber on the evening Mr. Burwell appeared there and spoke to the council urging the council not to re-consider this award to David McCormick for these various contracts?

A. Yes, sir.



Q. Did you hear Mr. Burwell make the statement to the council at that — while they were in session that Mr. McCormick would insist upon the awards that had been made to him and if necessary would take such legal steps as were necessary to protect his interests?

Mr. CHAMBERS: We object as incompetent, irrelevant, immaterial, and not proper cross-examination.

The COURT: Overruled.

Exception noted by defendants.

A. I did.

Q. Was that statement made before the council re-considered the motion or considered the motion to reconsider these awards to David McCormick?

A. The motion was up for consideration. It has not been voted on yet.

Q. While it was up for consideration Mr. Harris and Mr. Burwell spoke on the motion?

A. Yes, sir.

Q. Addressed the Mayor and City Council which was then in session?

A. Yes, sir.

Q. It was during the remarks of Mr. Burwell at that time that he made this statement?

A. Yes, sir.

Q. Then after that they reconsidered the matter and attempted to set aside the awards of David McCormick?

A. Yes, sir.

135 Redirect examination.

By Mr. PAUL:

Q. When did Mr. McCormick tender to you as such clerk these contracts?

A. Mr. McCormick did not tender them to me himself.

Q. Did Judge Burwell for him?

A. Yes, it was the night of the 16th.

Q. Of November?

A. Yes, sir.

Q. That was after the contracts had been awarded to the Conway Company?

A. Yes, sir, after they have been awarded and approved.

Q. To the Conway people?

A. Yes, sir.

Q. All been signed by the mayor and city council, the Conway contracts?

A. Yes, sir.

Recross-examination.

By Mr. BURWELL:

Q. The matter was up before the city council again on the evening on which these contracts were presented to you for the purpose

of having them executed, was it not, the matter of paving was it before the council at that time that evening?

A. Yes, sir, you presented the contracts the evening of the 16th.

Q. Mr. Burwell also spoke before the council on that evening didn't he?

A. Yes, sir.

Q. At that time is it not true that he stated to the Mayor and council that he demanded the execution of these contracts and the carrying out of the awards?

A. Judge, I don't think it was in that language exactly.

Q. Well, in substance that?

A. Practically that. I have got a record there showing you demanded the acceptance of them, I don't think you added the word execution in your demand. I think you demanded the acceptance of the contracts?

Q. And the carrying out of the awards?

A. I don't remember exactly that language. I know you demanded them and laid them on my desk.

Redirect examination.

By Mr. PAUL:

Q. As a matter of fact didn't Judge Burwell when he appeared before the council at that time say in the presence of the city council that he had his contracts there and he tendered them to the city council and laid them on your desk, and the council took no action on them whatsoever?

A. I don't remember exactly the words he used but he walked up in front, laid them on the desk and demanded they be accepted;

I took them laid them over to one side and the council took  
136 no action on them whatever. I have kept them ever since.

Recross-examination.

By Mr. BURWELL:

Q. Mr. McCormick also filed with you the formal bonds on the blanks that are usually used by the city for that purpose in contract of this kind, didn't he?

A. Judge, I could not state that because I never looked at the bonds; the bonds are there for themselves rolled up there; I didn't open them.

Q. David McCormick and the Conway people and all the other bidders put up certified checks for 3% of the amount of their respective bids, didn't they?

A. Yes, sir.

Q. After these contracts were awarded to Mr. McCormick on these eighteen different streets or contracts, didn't the Conway people take down *there* certified checks?

Mr. PAUL: Objected to as immaterial.

The COURT: Overruled.

A. The Conway people taken down a portion of their checks;

they didn't take all of them; so did Mr. McCormick; both of them taken down some of their checks.

Q. I want to make this plain now. Isn't it true that the Conway Company took down all their certified checks for the streets, the improvements that are involved in these eighteen contracts claimed by David McCormick?

A. No, sir, it did not.

Q. What checks did he not take down?

A. He taken down all the checks he had except three.

Q. What were they for?

A. These three checks made the required amount he should leave up. I gave him back all the small checks, didn't make any difference to me except I had 3% of the amount.

Q. The checks he originally put up as certified checks for these contracts, he left as certified checks for the other work outside of the work involved in these eighteen contracts?

A. Yes, sir.

Q. Therefore he did take down his deposit, took down his certified checks for these eighteen contracts?

A. Yes, sir.

Thereupon the witness was excused and

H. M. SCALES being first duly sworn, testified on behalf of the defendants, as follows:

137 Direct examination.

By Mr. PAUL:

Q. State your name to the court?

A. Henry Scales.

Q. What official position do you hold in Oklahoma City?

A. Mayor.

Q. How long have you been Mayor?

A. Since April, 1907.

Q. As such have you been the presiding officer of the council during the two years you have been Mayor?

A. I have.

Q. Mr. Scales, I hand you book styled Revised Ordinances of Oklahoma City, Oklahoma Territory, and will ask you to turn to pages 5, 6 and 7 of that book and state to the court whether or not as such presiding officer of the city council you have followed the rules laid down in that book governing the business of the council.

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, no evidence to show the rules referred to have been adopted by the city council as provided by law; nothing to show whether ever in force or in force at the time of the awarding of the contracts to David McCormick.

The COURT: Overruled.

Exception noted.

A. Yes, sir, pages 5, 6 and 7 of the book handed me do contain the rules of procedure that is followed by the city council.

Q. I wish you would turn to rule 12 and state to the court whether or not that rule has been followed during the two years of your incumbency as Mayor of the city by yourself as presiding officer and by the council generally.

Mr. BURWELL: Objected to for the reason no evidence to show that the same was ever adopted by the Mayor and city council as provided by law, nothing to show it was in force and effect at that time; incompetent, immaterial.

The COURT: Overruled.

Exception noted by complainant.

A. Rule 12 has to do with the question of reconsideration and is a rule in force in the procedure of the city council of Oklahoma City?

Mr. BURWELL: Move to strike out the last statement because it is a conclusion and no evidence to support it, not responsive to the question.

The COURT: Overruled.

Exception noted by complainant.

Q. Have these rules generally been accepted during all these years you have been Mayor and been followed by them?

138 Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, the fact they are generally followed would not put them in force as the valid binding rules of the city council.

The COURT: Overruled.

Exception noted by complainant.

A. They have been so followed.

Q. What is the procedure of the city council, the custom usually prevailing with reference to the acceptance of bids and making awards and entering into formal contracts for paving?

Mr. BURWELL: Objected to for the reason the making of contracts by Municipalities in Oklahoma is a matter of law, not matter of custom.

The COURT: Overruled.

Exception noted by complainant.

A. Why, advertisements for bids or proposals are inserted in a paper and at a stated or given time these proposals are opened in the open council chamber by the city clerk; the figures are usually read by our city engineer as assistant to the city clerk in that particular character of work. After reading of the bids, upon motion the contract or award is made to a certain firm or bidder; following which the city attorney prepares a written contract which is signed by the proposer or contractor and at the next meeting of the council, that contract coming through the clerk's office is presented to the council, signed by the contractor and then upon motion the mayor and city council are authorized to sign the contract on behalf of the city.

Q. What is the procedure with reference to the bonds that accompany contracts for paving, with reference to their approval or rejection?

A. They are approved also at the time the contract is entered into.

Q. You are acquainted with Mr. McCormick?

A. I am.

Q. Also the Parker Washington Company?

A. Yes, sir.

Q. How many contracts have been awarded to the Parker Washington Company or Mr. McCormick during your two years in office, if you know?

A. I could not state accurately.

Q. Been any awarded?

A. Yes, sir.

Q. About how many?

A. Oh, a half dozen at any rate.

Q. What has been the procedure and custom with reference to the execution of formal written contracts with the Parker Washington Company or McCormick with these contracts awarded to them?

139 Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, no defense to this action; the law fixes the manner and procedure and custom would not change it.

The COURT: Overruled.

Exception noted by complainant.

A. The procedure as already outlined, the same procedure I heretofore outlined. The award made at one meeting of the council and at the next meeting of the council is a statement of the contract signed by the Parker Washington Company with the necessary bond and then motion to authorize the mayor and city clerk to enter into contract.

Q. Is that the procedure relative to the execution of the contracts in this instance, with reference to these eighteen streets?

A. What instance do you refer to?

Q. With reference to the Conway Company contracts?

A. Yes, sir.

Thereupon the witness was excused without cross-examination.

Mr. PAUL: I desire to call Mr. McCormick for cross-examination on the bill.

The COURT: I will permit the defendant to call Mr. McCormick. I will extend the same privilege to your side, Judge Burwell.

Thereupon, DAVID McCORMICK, being first duly sworn, testified upon cross-examination, in his own behalf as follows:

Cross-examination.

By Mr. PAUL:

Q. Mr. McCormick, you say that you are President of the Parker Washington Company?

A. I am.

Q. You have bid on work in Oklahoma City and received contracts previous to these contracts that are in controversy here?

A. Yes, sir.

Q. For the Parker Washington Company?

A. Yes, sir.

Q. For the Parker Washington Company?

A. Yes, sir.

Q. Have you ever entered into contract with the city for paving other than by formal written contract?

A. The awards of the contracts have been followed up by written contracts.

Q. In other words, all your contracts for paving have been formally executed and signed by the parties, have they not?

A. We have signed contracts.

140 Q. And the city signed the contracts too, did they not?

A. Yes, sir.

Q. You heard the Mayor testify as to the procedure taken upon the awarding and execution of contracts, did you not?

A. I didn't listen to it carefully.

Mr. BURWELL: We object as not proper cross-examination.

The COURT: Sustained.

Q. You say in your bill you had contracted for something like \$35,000 of materials for the construction of these streets?

A. Yes, sir.

Q. With whom did you contract?

A. The O. K. Cement Company.

Q. For how many barrels of Cement?

A. The required amount for this contract.

Q. Is that the only contract you made?

A. That is the only contract we entered into in writing, we had figured on other materials for the work.

Q. You had not contracted with anyone?

A. We had not signed up contracts for them.

Q. The O. K. Cement Company have never endeavored to enforce the contract against you have they?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, no defense to this action.

The COURT: Sustained.

Q. Who represents the O. K. Cement Company?

A. Mr. Harter.

Q. Was it not understood between you and Mr. Harter at the time you purchased this cement that it was upon condition that the contracts should be eventually awarded to you by the city?

A. It was not.

Q. Has Mr. Harter, or the O. K. Cement Company ever offered to deliver any of the cement under the terms of this contract or you ever demanded it?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, has no bearing upon the issues.

The COURT: Overruled.

Exception noted by complainant.

A. We have never asked him to deliver it nor has he said as yet he wanted to deliver it.

Mr. BURWELL: You say you never asked him to deliver it?

A. No, sir.

Mr. BURWELL: And he never tried to deliver it?

141 A. He has not.

Mr. PAUL: Do you know what the price of cement is at this time whether higher or lower than it was at the time of the contract?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, not proper cross-examination; has no bearing on this case.

The COURT: Overruled; exception noted by complainant.

A. Cement quotations to us are about twenty cents a barrel more than what they were at the time the work was awarded to us at the time of the contract; twenty to twenty five cents a barrel more than they were after this work was awarded to us.

[A.] The price of cement is higher now than it was at that time?

A. Yes, sir.

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial.

Thereupon the witness was excused for the present and——

Mr. PAUL: We offer in evidence the published copy of the revised ordinances of Oklahoma with the rules of the city council therein.

Mr. BURWELL: To which the plaintiff objects for the reason that there is no showing that the rules referred to were ever regularly adopted by the Mayor and City Council at the city of Oklahoma City.

The COURT: Overruled; exception noted by complainant.

Thereupon GEORGE HESS was recalled for further direct examination by the defendants, as follows:

Direct examination.

By Mr. PAUL:

Q. Mr. Hess, at the time of the revision of these ordinances and the publication of them in pamphlet form together with the rules of the city council, can you state to the court how many of them were published. How many pamphlets were published?

A. Yes, sir.

Q. How many?

A. Two hundred.

Q. Were they circulated?

Mr. BURWELL: Objected to as incompetent, irrelevant, immaterial, calling for conclusion, not statement of fact.

The COURT: Overruled; exception noted by complainant.



142 A. Sold some of them, a few given away.  
Q. Sold some and gave some away?

A. Yes, sir.

Q. Under that rule you did sell some of them?

Q. Were they subject to be purchased by any person under the rules of the council?

A. Yes, sir.

Q. Under that rule you did sell some of them?

A. Yes, sir.

Q. And some of them were given away?

A. Yes, sir, gave some of them to attorney.

The COURT: How did they happen to be published, printed?

A. Council ordered them to be published by resolution; they were taken from the records we had there in the office.

Q. Who paid for the printing of this book?

A. The council.

The COURT: You know that of your own knowledge?

A. Yes, sir.

The COURT: When was that the publication was made?

A. It was along in May or June, I am not sure of the date; it is in the back part there, I don't remember it exactly. It was let to the lowest bidder, the contract for printing was.

The COURT: What year was that?

A. 1905, it was when the contract was let, June 1905.

The COURT: Has there been any other compilation or publication of the rules or ordinances purporting to be the rules or ordinances of the city since that time?

A. There has not.

The COURT: Where did you get this book you produced here? Who produced that?

A. I brought it here.

The COURT: Where did you get it?

A. I got it from the office.

The COURT: The office of the city clerk?

A. Yes, sir, I can tell you where that copy of rules came from if you want to know.

Mr. BURWELL: I read here from this rule twelve I believe that is the one you refer to, I wish you would turn to your journal and see if that rule was ever adopted?

A. I haven't got that journal down here.

Q. Have you the journal in your office showing the adoption of this particular rule set out here, showing that this particular rule was adopted by the city council and recorded on the journal of the proceedings of the city council in your office?

A. I don't know that I have.

Q. Don't you know that there is no such record in your office?

A. No, sir, I don't; I haven't found that record yet.

Q. You have searched for it?

A. Yes, sir.

Q. Been unable to find it?

A. Yes, sir.

Q. You searched as city clerk in charge of those records primarily for the purpose of finding the record where this particular rule had been adopted?

A. I don't have time to search all the way through all of them but I haven't had chance to find it yet.

Q. You searched several times for it?

A. Yes, sir.

Q. Been unable to find it?

A. Yes, sir.

Q. If there is such a record you don't know it?

A. No, sir.

Mr. PAUL: Have you ever seen a pamphlet ordinance book with the same rule in prior to this revised ordinance book?

A. Yes, sir.

Mr. BURWELL: I am going to insist on the objection to these rules: They are not shown to be approved nor shown that they were entered on the journal in the clerk's office; the statute provides that city clerks in cities of the first class shall keep a journal in which record of all proceedings shall be kept.

The COURT: Overruled.

Exception noted by complainant.

Q. When was that and where was it?

A. In my office about four years ago.

Q. What book was it?

A. It was in revised ordinance book, City of Oklahoma City.

Q. How long ago was that book published and when were these ordinances revised?

Mr. BURWELL: Objected to as incompetent, irrelevant and immaterial.

The COURT: Overruled.

Exception noted.

A. I don't know.

Q. Have you that ordinance book now?

A. No, sir.

Q. Know what became of it?

A. Yes, sir.

Q. What?

A. Why, the printer got it part of the time; you had it part of the time; I never got it any more.

Q. Is that the only one in existence?

A. Yes, sir, the only one I know of.

Q. Did that contain the same rules?

A. Yes, sir.

144 The COURT: What kind of book was that?

A. Pamphlet form book, just like that except just about half as big, had about two hundred ordinances in it.

The COURT: Was it pasted in or how?

A. No, sir, it was printed.

Cross-examination.

By Mr. BURWELL:

Q. You stated I believe that about two hundred contracts had been let since you were city clerk for public improvements?

A. I didn't say two hundred; I said there was over one hundred.

Q. Now you say about one hundred or over one hundred?

A. I say there was over one hundred, I am not positive exactly how many.

Q. I will ask you if after these contracts were awarded by the city council if they ever re-considered any of them and took the contract away from the person to whom it was first awarded?

A. Yes, sir.

Q. How many? I mean during the time you were clerk?

A. There was twenty.

Q. After the award was made?

A. Yes, sir.

Q. To whom were the awards made?

A. Two of them was made to the Cleveland Trinidad Paving Company and eighteen of them made to the Parker Washington Co. or David McCormick.

Q. Then just two outside of the eighteen contracts involved in this case?

A. That is all I remember of.

Q. Those were all involved in the same proceedings of the city council at this particular time weren't they, the Cleveland Trinidad Paving Co. had two of these contracts and David McCormick had eighteen?

A. Yes, sir.

Q. And the City reconsidered the awards to the Cleveland Trinidad Company, the two made to it and the eighteen made to David McCormick?

A. Yes, sir.

Q. Outside of these contracts now which were involved in the proceeding now under consideration by the court involved in this action, the city council as far as you know never reconsidered any award made for public improvements?

A. They did in the form of the contract.

Q. I am speaking about awards made upon bids such as these were?

A. I think there was a time they awarded a contract to the Conway people and then reconsidered that and awarded them the contracts over.

Q. But that was by the mutual consent of all the parties wasn't it?

145 A. Just by vote of the council.

Q. But it was done with the consent of those people?

A. I don't know whether they consented or not; they didn't give any consent in writing.

Q. Was it not at their instance that the city council convened and considered of those contracts?

A. Not that I know of.

Q. They didn't take the work away from them?

A. No, sir.

Q. They merely changed the form of the contract?

A. Yes, sir.

Q. After it had been entered into?

A. No, it had not been entered into, had not been signed up.

Q. Therefore this rule 12 to reconsider which purports to authorize the council to reconsider awards or actions of the council, had never been applied, as far as you know, to any award which was made for performing of any public work during your term of office?

A. Not except this time I mentioned.

Q. How long is it after work is completed before certificates are issued in payment of the work?

A. Well, that depends on the publication.

Q. I wish you would state to the court about the length of time usually consumed?

A. It takes about six weeks, six weeks to sixty days, runs from 50 to 60 days to get the bonds out.

Q. Has anything been done thus far looking towards the issuance of certificates for any of this work involved in these eighteen contracts?

A. Well, that ordinance has been passed on seven or eight streets.

Q. Which are involved in these contracts?

A. Yes, sir.

Q. That is one of the prerequisites for the issuance of the indebtedness of this matter?

A. Bonds cannot be issued until thirty days after the passage of the ordinance.

Q. After the ordinance is passed then what is done?

A. We hold the stuff there for payment for thirty days, give the people a right to pay off their shares; after thirty days then the council pass a resolution authorizing the mayor and council to issue the bond.

Q. Then the resolution has been passed authorizing any one to come in and pay for the bonds now?

A. Yes, sir.

Q. How soon will the other proceedings be due looking towards the issuance of the certificates in this case of indebtedness?

A. Not until thirty days are up.

146 Q. How long is it since the ordinances were passed?

A. Those ordinances were passed on the first day of February.

Q. Have you that ordinance here?

A. No, sir.

Q. Have you the book here which contains those ordinances?

A. No, sir.

Q. If not prevented by order of court, were you and the other officers of the city proceeding to issue its bonds in payment for work done under these contracts by the Conway Company?

A. Yes, sir.

Redirect examination.

By Mr. PAUL:

Q. In speaking about this reconsideration rule you say you don't recollect now of any contracts that had been reconsidered, awards that had been reconsidered; for the purpose of refreshing your memory I want to call your attention to the award of the contract for the Wheeler Park sewer which was reconsidered, do you remember that?

Q. He asked me about paving.

Q. Irrespective of whether paving or any other kind of contract?

A. There probably has been three or four contracts reconsidered for other classes of improvements; I had reference to paving alone.

Thereupon the Defendant rests and the Complainant introduced the following rebuttal testimony:

*Testimony for Complainant in Rebuttal.*

Mr. BURWELL: We now offer the contents of the petition in case No. 7968 in the District Court of Oklahoma County in which David McCormick is plaintiff, and the City of Oklahoma City and others were defendants, which petition was filed in the District Court of Oklahoma County, November 16, 1908.

Mr. CHAMBERS: We object as incompetent, irrelevant, and immaterial.

Mr. PAUL: That would incumber the record very materially.

Mr. BURWELL: We offer pages from one to thirteen inclusive without the exhibits, the exhibits having already been admitted.

Thereupon, JOHN J. MCCARTHY was recalled for further cross-examination by Mr. Burwell.

147 Q. I asked you before adjournment if you had taken down your certified checks on bids for the eighteen contracts which were awarded to David McCormick by the city and you stated you were unable to give me that information; I will ask you now to state whether or not you did take down those certified checks on those contracts?

A. I did.

Q. When did you come to Oklahoma City this last time?

A. Saturday morning.

Q. You came here for the purpose of attending the trial of this case?

A. And looking after work.

Q. You have employed counsel to look after your interests in this trial?

Mr. CHAMBERS: Objected to as incompetent, irrelevant, immaterial.

The COURT: Sustained.

Exception noted by complainant.

Q. What attorneys represent you in Oklahoma City?

Mr. CHAMBERS: We object as incompetent, irrelevant, immaterial.

Mr. BURWELL: Here counsel for complainant offers to prove by this witness that counsel who was present in the trial of this cause have been employed by the Conway Company to represent their private interest in this suit and to protect whatever interest they may have or whatever interest they may have which may be affected by the result of this action.

Mr. CHAMBERS: We object as incompetent, irrelevant, immaterial.

The COURT: Objection sustained.

Exception noted by complainant.

Thereupon the witness was excused and J. F. HAVENS, being first duly sworn, testified on behalf of the complainant in rebuttal as follows:

Direct examination.

By Mr. BURWELL:

Q. Mr. Havens, you are Deputy Clerk of the District Court of Oklahoma County?

A. Yes, sir.

Q. I will ask you if you have examined the record in the case of McCormick vs. Scales as Mayor of Oklahoma City and others, No. 7968?

A. I have.

Q. Is that suit still pending in your court?

A. It is.

148 Cross-examination.

By Mr. PAUL:

Q. I wish you would turn to that record of No. 7968 and tell the court what proceedings were had in that cause from that time to this?

A. Well, on November 16 there was petition filed for injunction; restraining order granted; afterwards motion to modify restraining order filed; afterwards on December 3, demurrer to petition was filed; on December 3, there was an order of court continuing the hearing of the temporary injunction on December 4, the temporary restraining order continued in force; afterwards on the same date upon hearing of the demurrer it was sustained; December 5, the court granted plaintiff leave twenty days to file amended petition; on December 23, the court granted plaintiff leave fifteen days additional to file amended petition on January 25, 1909, there was an order made granting the plaintiff ten days additional to file amended petition; also order on same date dismissing case at cost of plaintiff; afterwards on January 27, order of court setting aside dismissal on January 25.

Q. Is that all the proceedings?

A. Yes, sir.

*Stipulation That Conway Co. Was Made Party Defendant in State Court in Case of McCormick vs. Oklahoma City et al.*

It is here agreed by and between counsel for complainants and defendants that in the case in the District Court of Oklahoma County, McCormick vs. City of Oklahoma City and others, by leave of court, Conway Company were made parties defendant and appeared by counsel at the hearing for temporary injunction.

Thereupon the Complainant rests his case.

*Testimony for Defendants.*

Thereupon GEORGE HESS was recalled by the defendants for further

Direct examination.

By Mr. PAUL:

Q. I hand you council Journal No. 6, I wish you would turn to page 54 of that record and state what you find there with reference to the adoption of any rules of the city council as to whether or not there are any rules of the city council on that record?

149 A. Under date of April 9, 1901, rules from one to nineteen appear.

Q. Does that record show the adoption of those rules?

A. Yes, sir.

Mr. PAUL: We now offer this record showing the adoption of these rules, found on pages 54, 55, 56, 57 and 58, together with the action of the city council adopting the same.

Mr. BURWELL: We object to this because the record already introduced here of date in 1902, shows that the rules were adopted at that time.

The COURT: Have you compared them with the rules in the printed book which you have identified here?

A. I haven't read over all of them. I think they are the same; I have not proof read them.

The COURT: Overruled.

Exception noted by complainant.

The said record is as follows:

"OKLAHOMA CITY, O. T., April 9, 1901.

Mr. PAUL:

Council met as per adjournment with the Mayor and following councilmen present:

The following rules for the government of the council were submitted by Mr. \_\_\_\_\_. Rule- no. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19.



I particularly desire to call the attention of the court and read rule No. 12, which reads as follows:

"Rule 12. A question may be reconsidered at any time during the same meeting or the first meeting thereafter. No motion shall be reconsidered more than once nor shall a vote to reconsider be reconsidered, but any member of the council who has voted in the affirmative shall have the right to move for a reconsideration."

Those nineteen rules were read by the clerk; then this record here says:

"Moved by Mr. ——— that the rules as read by the Clerk be adopted. Motion to amend by Mr. ——— to strike out the last section of rule 13. Amendment lost by the following roll call vote: ..... Question was put upon the original motion and carried by unanimous vote."

Thereupon defendants rest.

#### 150 *Testimony for Complainant, Additional.*

Thereupon on application of counsel for complainants, the plaintiff is permitted to introduce additional testimony as follows:

G. A. PAUL, being first duly sworn, testified on behalf of the complainant as follows:

Direct examination.

By Mr. BURWELL:

Q. You may state your name?

A. G. A. Paul.

Q. You are one of the attorneys who is assisting in conducting the defense in this case?

A. I am.

Q. You are acquainted with the Conway Paving Company?

A. Yes, sir.

Q. Which has been referred to in the testimony in this case?

A. Yes, sir.

Q. Are you employed by the Conway Company as their attorney in matters generally?

Mr. CHAMBERS: Objected to as incompetent, irrelevant, immaterial.

The COURT: I will permit the testimony. Ruling reserved.

A. I have an employment by the Conway Company whereby I look after their matters pertaining to the contracts awarded and papers and proceedings of the council, abstracts and proceedings so forth, Yes sir, but I would not consider it a general employment for all purposes.

Q. You are paid a stipulated salary per month for looking after their business?

A. Yes, sir, that kind of business, yes, sir.

Q. When this suit was first filed in the Circuit Court of the United States, you learned of it you went to Guthrie in the interest of the Conway Company and appeared before Judge Cottrel at that place?

A. Well, I will tell you the way that really came about. As soon as the restraining order was served, Mr. Burke handed me a copy of it because he was unable to see Mr. Taylor, the City Attorney. As soon as Mr. Taylor came down, he and I went over the matter together. We supposed of course it was city business in this matter and indirectly the Conway Company were affected by it and my object in going to Guthrie to procure a modification of the restraining order was more for the benefit of the city than it was for Conway Company.

Q. It was for them also?

151 A. Mr. Taylor and I went over to your office, tried to get you to consent to the modification of it in behalf of the city and we could not agree upon anything; then I suggested to you we would apply to the court for modification; the application for modification was filed in the city's name, but I presented it.

Q. As attorney for Conway Company?

A. Well I am their attorney as I suggested in the manner I suggested.

Q. As attorney for the Conway Company you are looking after their interest in the trial of this case taking such steps as you deem necessary for their interest?

A. I say in this proceeding I am assisting the city attorney.

Q. Answer my question.

(Question repeated.)

A. As stated I am assisting the city attorney in handling this matter together with Mr. Chambers and Mr. Taylor.

Q. After you received information that this restraining order had been issued by the United States Circuit Judge you communicated that fact to the Conway people.

A. Most certainly I did. I will tell you why, though.

Q. You communicated first with them in reference to it?

A. The first communication I received was from the city engineer.

Q. I didn't ask you that?

A. I said I communicated it, I would like to explain it though.

Mr. BURWELL: We object to counsel making a statement which is not pertinent to the question asked.

Q. Mr. Paul, has the city council of Oklahoma City regularly employed you to appear in this case?

A. It has not.

Q. You have no employment from the city?

A. I have no such employment, no, sir.

Q. Then the only employment which you have which permits you to appear here is the employment which you have from the Conway Company?

A. And the understanding with the city attorney, yes, sir.

Q. You also filed the motion or application in this case on behalf of the Conway people to be made parties to this action?

- A. I did the day we were up in Guthrie, a week ago, today I think it was, but we have abandoned that, asked to withdraw it.
- 152 Q. When you filed that application you were acting on behalf of the Conway Company?

A. I certainly was.

Mr. BURWELL: I would like to have that application considered in evidence.

Cross-examination.

By Mr. CHAMBERS:

Q. You are in this proceeding here by request of the city attorney?

A. Yes, sir.

Q. You started to make an explanation with reference to a certain question asked by Judge Burwell, go ahead and make it now.

A. My recollection is Judge Burwell asked me whether I did or did not take steps for the Conway Company immediately upon notice of the restraining order being issued by the court and I stated that I did and desired to explain; that explanation is this, that as I understood, the Marshal got down here with the restraining order and meeting Mr. Burke, as City Engineer he was served with notice of the restraining order; before I got down to my office Saturday morning, that is last Saturday a week ago, Mr. Burke notified me that the court had restrained the construction work and for me to get in communication with the Conway Company at once so they would take their men off of the work. I told him to wait until I got down to the office. I got down to the office, he handed me his copy of the restraining order and I got in communication with Mr. Bell, Superintendent of the Conway Company, and told him that there was a restraining order issued out of the United States Court, to wait until we saw what the effect of it was; then I took the matter up immediately with Mr. Taylor; together we went over to Judge Burwell's [order]; tried to get an agreement of some sort to permit this work to go on before we knew that bond had not been given and the restraining order was not effective; that is all we done for Conway Company.

Redirect examination.

By Mr. BURWELL:

Q. After you came over to Mr. Burwell's office you were advised by him that no bond had been given and the order was not in effect?

A. I don't remember whether you told that to Mr. Taylor and I there or not.

Q. To refresh your memory didn't you read me a portion of the order which says it should be in force even though no bond should be given?

A. Yes, sir, I remember that. There was some question as to whether or not you contemplated giving that bond immediately. You stated you were going to give the bond immediately. When I went to see Judge Cottrell in Guthrie he told

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me what you said in that respect. That is how we were affected because the Conway Company was busy with this work and necessarily would have to cease work in the event you gave bond.

Thereupon the witness was excused and

TOM CHAMBERS, being first duly sworn, testified on behalf of the complainant as follows:

By MR. BURWELL:

Q. You are a member of the firm of Flynn, Ames and Chambers?

A. Yes, sir.

Q. As a member of that firm you are appearing in this case and defending this action?

A. Yes, sir.

Q. The firm of which you are a member were attorneys for the Conway Paving Company in the case that was filed in the District Court of Oklahoma County—

A. You mean in the other case?

Q. Yes, sir, in the other case?

A. Possibly so, but I would not want to swear to it positively; because I don't believe I understood it that way.

Q. Has there been any action of the city council of Oklahoma City or of its officers employing your firm to represent the City in this litigation?

A. Not to my knowledge.

Q. Isn't it your understanding that your firm are incidentally looking after the interests of the Conway Company in this litigation?

A. Our employment is by the firm of Farmer and Root; our employment in the other case was by the firm of Farmer and Root; we never had anything to do with the Conway Company in this case or in the other case.

Q. Who are Farmer and Root?

A. They are some men here in business.

Q. Who are engaged in the business or occupation of securing contracts for paving or improvements for the Conway Company?

A. I don't know whether they are for the Conway especially or not but I don't think that is their business.

Q. Were any of these eighteen contracts secured through your efforts?

A. You will have to ask them that, I don't know.

Q. Has your firm received any payment from any one for services in this case?

A. No, sir. Let me tell you the contract was entered into between Mr. Farmer and Mr. Ames, or Mr. Root and Mr. Ames. I don't know I wasn't present at the time and don't know the nature of it.

Q. You know that as a matter of general information in the office?

A. Yes, sir.

Thereupon the witness was excused and

R. T. FARMER, being first duly sworn, testified as follows:

Direct examination.

By Mr. BURWELL:

Q. What is your name?

A. R. T. Farmer.

Q. You are a member of the firm of Farmer and Root?

A. Yes, sir.

Q. What is your business?

A. Why, we represent the M. A. Earl & Co. consulting engineers; the Indiana Shovel Company, Indiana Bridge Company of Indianapolis, and other concerns.

Q. Are they in any way interested in the outcome of this litigation? Can they be affected in any way by any judgment that might be rendered in this case?

A. No, sir.

Q. Are they in any way interested in the Conway Company as far as you know?

A. Not to my knowledge.

Q. Are you in any way or your firm in any way interested in these paving contracts involved in this case?

A. I am personally but Mr. Root is not.

Q. In what way are you interested?

A. As agent for the Company.

Q. For the Conway Company?

A. Yes, sir.

Q. As such agent you employed the firm of Flynn, Ames, and Chambers to appear and defend this case?

A. I did not retain the firm as I remember it.

Q. You had employed them to look after the interests of the Conway Company pertaining to this paving matter?

A. We did in the other case, to represent the Conway Company.

Q. If they received any employment from you or your firm pertaining to these matters, that employment was in the interest of the Conway Company?

A. It was to assist the City.

Q. For the benefit of the Conway Company?

A. Indirectly, yes, sir.

Thereupon the witness was excused and complainant rests and defendants rest and no further evidence was introduced and the case was thereupon declared closed.

\* \* \* \* \*

155 (Here follows a copy of the Bill of Complaint and Exhibit A thereto and of the Amendment to the Bill of Complaint in this case and they are omitted to avoid duplication.)

## EXHIBIT A.

*Paving Resolution for Paving of Portion of Certain Streets and Avenues.*

## Paving Resolution No. 1.

## A Resolution to Pave Portions of Certain Streets and Avenues.

Be It Resolved by the Mayor and City Council of the City of Oklahoma City, Oklahoma:

First, That it is necessary to pave: 11th Street from W. line of the A., T. & S. F. R. R. Right of way to the E. line of Robinson Ave.; Broadway from the N. line of 13th st. to the S. line of 14th st.; 14th st. from the E. line of Broadway to the E. line of Robinson Ave. Dale ave. from the N. line of Park place to the S. line of 13th st. and Park Place from the E. line of Broadway to the E. line of Dale Ave.

Second St. from the W. line of Western Ave. to the E. line of Blackwelder Ave.; 2nd st. from the E. line of Blackwelder ave. to the E. line of Ohio Ave.; 3rd st. from the W. line of Lee ave. to the W. line of Carey & Weaver's addition; 5th st. from the W. line of Walker ave., to the E. line of Western Ave.; 6th st. from the E. line of Walker ave. to the E. line of Lee ave.; 9th st. from the E. line of Walker ave. to the E. line of Lee ave.; Shartel ave. from the N. line of 4th st. to the S. line of 8th st. and Shartel ave. from the N. line of 8th st. to the S. line of 11th st. and Jamestown ave. from the W. line of Western ave. to the E. line of Klein ave.

Walker ave. from the N. line of 13th st. to the N. line of 16th st. Dewey ave. from the N. line of 17th st. to the S. line of 19th st.; Lee ave. from the N. line of 17th st. to the S. line of 19th and Western Ave. from the N. line of Main st. to the N. line of 17th st.;

Classen Boulevard from the N. line of 16th st. to the N. line of 37th; 16th st. from the E. line of Shartel ave. to the E. line of McKinley ave.; 18th st. from the W. line of Dewey ave. to the E. line of Western ave.; 19th st. from the E. line of Dewey ave. to the E. line of Western ave.;

California ave. from the E. line of Dewey ave. to the E. line of Shartel ave.; California ave. from the E. line of Shartel ave. to the E. line of Western ave.; Washington ave. from the W. line of

156 Broadway to the E. line of Robinson ave.; Washington from the W. line of Robinson to the E. line of Walker Ave.; Robinson ave. from the S. line of St. L. & S. F. R. R. right of way to N. line of Ash st. and Lee ave. from S. line of Main st. to N. line of Reno ave.

Byers ave. from N. line of 3rd st. to S. line of 4th st.; 6th st. from W. line of Phillips ave. to N. line of Kelley ave.; Clark ave. from N. line of 2nd st. to S. line of 3rd st.; Stiles ave. from S. line of 1st st. to S. line of 3rd st. 11th st. from E. line of Geary ave. east 189.2 ft.; 12th st. from E. line of Geary ave. east 189.2 ft. all in the city of Oklahoma City, Oklahoma, to do the necessary con-

creting to construct man holes and catch basins and to put in the inlet pipes lateral storm sewers, curbs and reset curbs therefor.

Second. That if the owners of more than one half in area of the lots, pieces or parcels of ground liable to assessment for the cost of these improvements with assessment shall include the cost of improving the streets and alleys intersections, do not within fifteen (15) days after the last publication of this resolution file with the Clerk of said City their protest in writing against such improvements, such protest or objection to be made as to each of the above named streets separately, then the Mayor and City Council shall cause such improvements to be made and constructed, all at the expense of the said lots, pieces or parcels of ground as provided for in House Bill No. 231 of the Legislature of the State of Oklahoma, dated April 17, 1908, entitled

"An Act to provide for the improvement of streets and other public places within cities of the first class by grading, paving, macadamizing, curbing, guttering and draining the same, and declaring an emergency."

Third. That this resolution shall be published in six consecutive issues of the Oklahoma City Times, a daily newspaper published and of general circulation in said City.

Approved and adopted this 21st day of September, 1908.

[SEAL.]

HENRY M. SCALES, *Mayor*.

Attest:

GEORGE HESS, *City Clerk*.

### Paving Resolution No. 2.

#### A Resolution to Pave Portions of Certain Streets and Avenues.

Be It Resolved by the Mayor and City Council of the City of Oklahoma City, Oklahoma:

157 First. That it is necessary to pave Shartel ave. from the N. line of 16th st. to the S. line of 19th st.: Walker ave. from the N. line of 4th st. to the S. line of 6th st.: 3rd st. from the W. line of Robinson ave. to the W. line of Lee ave.: Broadway from the N. line of Washington ave. to the S. line of the East and West alley between Tena and Choctaw avenues; and Linday ave. from the N. line of 4th st. to the S. line of 5th st.: all in the city of Oklahoma City, Oklahoma, to do the necessary grading, to construct manholes and catch basins and to put in inlet pipes, lateral storm sewers, curbs and reset curbs therefor.

Second. That if the owners of more than one half in area of the lots, pieces or parcels of ground liable to assessment for the cost of these improvements, which assessments shall include the cost of improving the streets and alley intersections, do not within fifteen (15) days after the last publication of this resolution file with the Clerk of said City their protest in writing against such improvements such protest or objection to be made as to each of the above named streets separately, then the Mayor and City Council shall cause such improvement to be made and constructed, all at the ex-



pense of the said lots, pieces or parcels of ground as provided for in House bill No. 231 of the Legislature of the State of Oklahoma, dated April 17, 1908, entitled "An act to provide for the improvements of streets and other public places within cities of the first class by grading, paving, macadamizing, curbing, guttering, and draining the same and declaring an emergency."

Third. That this resolution shall be published six consecutive issues of the Oklahoma City Times, a daily newspaper published and of general circulation in said City.

Approved and adopted this 21st day of September, 1908.

[SEAL.]

HENRY M. SCALES, *Mayor*.

Attest:

GEORGE HESS, *City Clerk*.

#### Paving Resolution No. 4.

#### A Resolution to Pave Portions of Certain Streets and Avenues.

Be It Resolved By the Mayor and City Council of the City of Oklahoma City, Oklahoma:

First. That it is necessary to pave: 7th St. from E. line of Stiles Ave. to the W. line of Stonewall Ave.; Phillips Ave. from N. line of 4th St. to the N. line of 10th St.; Shartel Ave. from N. line of 19th St. to a point 290 ft. N. of the N. line of 25th St. and 158 6th St. from W. line of Robinson Ave. to E. line of Walker Ave. all in the city of Oklahoma City, Oklahoma, to do the necessary grading, to construct manholes and catch basins and to put in inlet pipes lateral storm sewers, curbs and reset curbs therefor.

Second. That if the owners of more than one half in area of the lots, pieces or parcels of ground, liable to assessment for the cost of these improvements, which assessment shall include the cost of improving the streets and alley intersections, do not within fifteen (15) days after the last publication of this resolution file with the Clerk of said City their protest in writing against such improvements, such protest or objection to be made as to each of the above named streets separately, then the Mayor and City Council shall cause such improvement to be made and constructed, all at the expense of the said lots, pieces, or parcels of ground as provided for in House Bill No. 231 of the Legislature of the State of Oklahoma, dated April 17, 1908, entitled "An act to provide for the improvement of streets and other public places within cities of the first class by grading, paving, macadamizing, curbing, guttering and draining the same and declaring an emergency."

Third. That this resolution shall be published in six consecutive issues of the Oklahoma City Times, a daily newspaper published and of general circulation in said City.

Approved and adopted this 21st day of September, 1909.

[SEAL.]

HENRY M. SCALES, *Mayor*.

Attest:

GEORGE HESS, *City Clerk*.

## EXHIBIT B.

*Resolution of Mayor and City Council Providing for Paving of Certain Streets, etc.*

## A Resolution of the Mayor and Council of the City of Oklahoma City, Oklahoma.

Be It Resolved by the Mayor and Council of the City of Oklahoma City, Oklahoma:

Whereas; a resolution has been passed by the said Mayor and City Council and regularly published in six consecutive issues of the official paper of said City, providing for certain improvements to be made on certain streets and avenues, as hereinafter described.

159 And Whereas the time for objection or protest on the part of the property owners has expired and no sufficient protest or objections have been filed and that all of the proceedings have been regular and in due form as provided by law, and the said Mayor and City Council having determined to proceed with such improvements in accordance with said resolution;

Be it Resolved therefore that Shartel Ave. from N. line of 16th St. following said avenue in a north and in a northwesterly direction to a point at which the same intersects the west line of said avenue where the same takes a due north course be paved a total width of 30 ft. from face of curb to face of curb; Walker Ave. from the north line of 4th St. to the south line of 6th St. be paved a total width of 36 ft. from face of curb to face of curb; Broadway from N. line of Washington Ave. to S. line of East and West alley between Choctaw and Tena Aves. be paved a total width of 40 ft. from face of curb to face of curb; Lindsay Ave. from N. line of 4th St. to S. line of 5th St. be paved a total width of 30 ft. from face of curb to face of curb; 3rd St. from W. line of Robinson Ave. to center line of Walker Ave. be paved a total width of 40 ft. and from center line of Walker Ave. to W. line of Lee Ave. be paved a total width of 30 ft. from face of curb to face of curb; all of said streets being in the City of Oklahoma City, Oklahoma and that the material to be used in the paving of the roadways of said streets shall be 1½ inches of sheet asphalt 1½ inches of Binder and 5 inch Portland cement concrete base and that the necessary grading be done and catch basins, manholes, concrete curb and guttering and draining be constructed therefor and that the city engineer of said city be, and he hereby is authorized and directed to prepare plans and plats, profiles, estimates and specifications for such construction.

It is further resolved that all the work done and material furnished shall be in strict conformity to the plans and specifications of the city engineer therefor and of the proper quality and tests. That the contractor to whom a contract shall be awarded for the construction of such improvements shall execute to the city a good and sufficient bond in a sum equal to 20% of the contract price conditioned for the faithful performance of the work and the execu-

tion of the contract and for the protection of the said city and all property owners against any and all loss or damage by reason of neglect or improper execution of the work and the said contractor shall also execute good and sufficient bond in a sum of 10% of the contract price conditioned for the maintenance of such work in a street of good repair for a period of not less than five years

160 from the date of the completion and acceptance of such work.

Be It Further Resolved that the city clerk of said city be and he is hereby authorized and directed to advertise for sealed bids for furnishing the materials and performing the work necessary to and for the improvement of such streets in the manner required by law, each bid to be accompanied by certified check in the sum of 3% of the amount of the bid, to be forfeited to the city in case the successful bidder fails to enter into the contract and give the required bond within the required time.

Passed by the council this 19th day of October, 1908.

Approved by the Mayor this 19th day of October, 1908.

{SEAL.}

HENRY M. SCALES.

Mayor.

Attest:

GEORGE HESS, *City Clerk.*

### EXHIBIT "D".

#### *Notice to Paving Contractors.*

(Published Oct. 21 to 31, 1908.)

In accordance with a resolution passed by the Mayor and Council, October 19, 1908, sealed bids will be received at the office of Geo. Hess, City Clerk, up to 5 o'clock p. m., November 2, 1908, and will be considered by the Mayor and Council at the council chamber in the city hall at 8 o'clock P. M., on said date for the paving of the following streets, according to the plans and specifications now on file in the office of the City Clerk. Bids to be received on each street separately. Broadway from the N. line of 13th St. to the S. line of 14th St.; 14th St. from the E. line of Broadway to the E. line of Robinson Ave.; Park Place from the E. line of Broadway to the E. line of Dale Ave.; 5th St. from the W. line of Walker ave. to the E. line of Western Ave.; 6th st. from the W. line of Robinson Ave. to the E. line of Walker Ave.; 6th St. from the E. line of Walker Ave. to the E. line of Lee Ave.; 9th St. from the E. line of Dewey Ave. to the E. line of Shartel Ave.; Shartel Ave. from the N. line of 4th St. to the S. line of 8th st.; Shartel Ave. from the N. line of 19th St. to a point 296 ft. N. of the N. line of 25th St.; Walker Ave. from the N. line of 13th St. to the N. line of 16th St.; California Ave. from the E. line of Shartel Ave. to the E. line of Western Ave.; Washington Ave. from the W. line of

Broadway to the E. line of Robinson Ave.; Washington Ave. from the W. line of Robinson Ave. to the E. line of Walker Ave. and Lee Ave. from the S. line of Main St. to the N. line of Reno Ave. be paved a total width of 30 ft. from face of curb to face of curb; 19th St. from the E. line of Dewey Ave. to the W. line of Western Ave. Oklahoma Ave. from the N. line of 2nd St. to the S. line of 3rd St.; 11th St. from the E. line of Geary Ave. E. 189.2 ft.; and 12th St. from the E. line of Geary Ave. E. 189.2 ft. each be paved a total width of 28 feet from face of curb to face of curb; Dale Ave. from the N. line of Park Place to the S. line of 13th St. 2nd. St. from the W. line of Western Ave. to the E. line of Blackwelder Ave.; 2nd St. from the E. line of Blackwelder Ave. to the E. line of Ohio Ave.; Jamestown Ave. from the W. line of Western Ave. to the E. line of Klein Ave.; Dewey Ave. from the N. line of 17th St. to the S. line of 19th St.; Lee Ave. from the N. line of 17th st. to the S. line of 19th st.; 16th St. from the E. line of Shartel Ave. to the E. line of McKinley Ave.; 18th St. from the W. line of Dewey Ave. to the E. line of Shartel; 6th St. from the W. line of Phillips Ave. to the W. line of Kelley Ave.; 7th St. from the E. line Stiles Ave. to the W. line of Stonewall Ave.; Stiles Ave. from the S. line of 1st St. to the S. line of 3rd St. and Phillips Ave. from the N. line of 4th St. to the N. of 10th St.; Shartel Ave. from the N. line of 8th st. to the S. line of 11th St. each be paved a total width of 26 feet from the face of curb to face of curb; 11th St. from the E. line of Robinson Ave. to the north and south alley between Robinson Ave. and Broadway be paved a total width of 30 feet and from said alley east to the W. line of the A. T. and S. F. R. R. right of way be paved a total width of 26 feet from face of curb to face of curb; Western Ave. from the N. line of Main St. to the S. line 13th St. be paved a total width of 30 feet from face of curb to face of curb, and from the S. line of 13th St. to the S. line of 16th St. be paved with a double driveway a total width of 20 feet from face of curb to face of curb on each side of the Street Car Co., right of way, including the full width of the street intersections, and from the S. line of 16th St. to the N. line of 17th st. a total width of 30 feet from face of curb to face of curb; Classen Boulevard from the N. line of 16th St. to the N. line of 37th St. be paved with a double driveway of 23 feet from face of curb to face of curb on each side of the street car right of way including the full width of the street intersections; California Ave. from the E. line of Dewey Ave. to the E. line of Shartel Ave. be paved a total width of 40 feet from face of curb to face of curb; 3rd st. from the W. line of Lee Ave. to the E. line of Carey

162 and Weaver's Add. be paved a total width of 30 feet and from the E. line to the W. line of said addition be paved a total width of 26 feet from face of curb to face of curb, and Byers Ave., which is an irregular street, from the N. line of 3rd St. to the S. line of 4th St. be paved its total width from property line to property line, all of said streets being in the City of Oklahoma City, Oklahoma, and be paved with asphalt. Each bid must be accompanied by certified check in the sum of three per cent (3 per cent)

of the amount bid, to be forfeited to the city in case the successful bidder fails to enter into a contract and give the required bond within the required time. Contractor will be required to give bond in the sum of twenty per cent (20 per cent) of the contract price, for the faithful performance of said work and the holding of the city harmless from any and all damages which might occur. Bids will be received from both a five (5) year and ten (10) year guarantee. Also, the contractor will be required to give a bond in the sum of ten per cent (10 per cent) of the contract price as a guarantee of keeping the pavement in a state of good repair for a period of five (5) years if bids are accepted on a five (5) year guarantee, and in a state of good repair for a period of ten (10) years if bids are accepted on a ten (10) year guarantee. The contractor shall receive for the above work Street Improvement Bonds at par value against the abutting property according to House Bill No. 231, Approved April 17th, 1908.

No proposals will be considered on any street which does not contain a bid upon every item included in the estimate of the City Engineer for such street.

Council reserves the right to reject any or all bids.

[SEAL.]

GEO. HESS,

*City Clerk.*

### EXHIBIT "E".

#### *Notice to Paving Contractors.*

(Published Oct. 21 to 31, 1908.)

In accordance with a resolution passed by the Mayor and Council, October 19, 1908, sealed bids will be received at the office of Geo. Hess, City Clerk, up to 5 o'clock P. M. November 2, 1908, and will be considered by the Mayor and Council at council chamber in the City hall at 8 o'clock P. M., on said date for the paving of the following streets, according to the plans and specifications now on file in the office of the City Clerk. Bids to be received on each street separately.

163 Shartel Ave. from the N. line of 16th st. following said avenue in a north and in a northwesterly direction to a point at which the same intersects the west line of said avenue where the same takes a due north course be paved a total width of 50 ft. and from thence north to the south line of 19th st. a total width of 30 ft. from face of curb to face of curb; Walker ave. from the north line of 4th st. to the south line of 6th st. be paved to total width of 30 ft. from face of curb to face — curb; Walker ave. from the north line of 4th st. to the south line of 6th st. be paved a total width of 36 ft. from face of curb to face of curb; Broadway from N. line of Washington ave. to S. line of East and West alley between Choctaw and Tena aves. be paved a total width of 40 ft. from face of curb to face of curb; Linday ave. from N. line of 4th st. to S. line of 5th st. be paved a total width of 30 ft. from face of curb to face

of curb, and 3rd st. from the W. line of Robinson ave. to the center line of Walker ave. be paved a total width of 40 ft. and from the center line of Walker ave. to the W. line of Lee ave. be paved a total width of 30 ft. from face of curb to face of curb; all of said streets being in the City of Oklahoma City, Oklahoma, and be paved with asphalt. Each bid must be accompanied by certified check in the sum of three per cent (3 per cent) of the amount bid, to be forfeited to the City in case the successful bidder fails to enter into a contract and give the required bond within the required time. Contractors will be required to give a bond in the sum of twenty per cent (20 per cent) of the contract price, for the faithful performance of said work and the holding of the city harmless from any and all damages, which might occur. Bids will be received for both five (5) year and ten (10) year guarantee. Also, the contractor will be required to give a bond in the sum of ten per cent (10 per cent) of the contract price as a guarantee of keeping the pavement in a state of good repair for a period of five (5) years if bids are accepted on a five (5) year guarantee, and in a state of good repair for a period of ten years (10) if bids are accepted on a ten (10) year guarantee. The Contractor shall receive for the above work Street Improvement Bonds at par value against the abutting property according to House Bill No. 231, Approved April 17th, 1908.

No proposals will be considered on any street which does not contain a bid upon every item included in the estimate of the City Engineer for such street.

Council reserves the right to reject any or all bids.

[SEAL.]

GEO. HESS,

*City Clerk.*

164 *Proposal of McCormick to Pave Nineteenth Street.*

**Form of Proposal.**

OKLAHOMA CITY, November 2, 1908.

To the Hon. Mayor and City Council, City.

GENTLEMEN: The undersigned agree to furnish all the necessary tools labor and material for the paving of 19th St. from Dewey to Western and to perform the work in the manner and under the conditions required by the specifications therefor, at the following prices, to-wit:

Sheet asphalt pavement, inc.	5 yrs.	10 yrs.
5 inch Portland cement concrete foundation .....	per sq. yd. \$ 2.02	2.09
Earth excavation .....	per cu. yd. \$ .35	.35
Rock excavation .....	per cu. yd. \$.....	.....
Embankment .....	per cu. yd. \$.....	.....
Str. concrete curb and gutter, rad. 6" curb .....	per lin. ft. \$ .74	.74

Rad. concrete curb and gutter, etr. 6"		
curb .....	per lin. ft.	\$ .74 .74
Str. concrete curb and gutter, 4" curb. . . . .	per lin. ft.	\$ . . . . .
Rad. concrete curb and gutter. . . . .	per lin. ft.	\$ . . . . .
Resetting concrete curb and gutter. . . . .	per lin. ft.	\$ . . . . .
Resetting stone curb. . . . .	per lin. ft.	\$ . . . . .
Concrete double gutter. . . . .	per lin. ft.	\$ .74 .74
Concrete single gutter. . . . .	per lin. ft.	\$ . . . . .
3" Oak header. . . . .	per lin. ft.	\$ .15 .15
Vit. pipe in place, inc., backfill. . . . .	per lin. ft.	\$ . . . . .
10 inch. . . . .	per lin. ft.	\$ .60 .60
12 inch. . . . .	per lin. ft.	\$ .80 .80
15 inch. . . . .	per lin. ft.	\$ 1.00 1.00
18 inch. . . . .	per lin. ft.	\$ . . . . .
21 inch. . . . .	per lin. ft.	\$ . . . . .
24 inch. . . . .	per lin. ft.	\$ 2.30 2.30
27 inch. . . . .	per lin. ft.	\$ 2.60 2.60
Manholes complete. . . . .	Each	\$40.00 40.00
Catch basins. . . . .	Each	\$20.00 \$20.00

I agree to commence work within — days after signing the contract and to complete same within six months after commencement. Herewith, certified check for Six Hundred Thirty and no/100 — (\$630.00) as required.

(Signed)

DAVID McCORMICK,

*Contractor.*

By — — —, *Agent.*

Proposals must be signed by contractor or authorized by agent.

\* \* \* \* \*

165 (Here follow Exhibits 2 to 18 inclusive, being Proposals of David McCormick for the paving of all streets other than that included in Exhibit 1, which are involved in this action, each of said exhibits being the same in form as Exhibit 1 but covering different streets and different prices.)

### *Testimony for Defendants.*

Minutes of Meeting of City Council Nov. 11, 1908, Awarding Contracts for Paving Certain Streets to R. F. Conway Co.

(Council Journal No. 12) Page 251.

OKLAHOMA CITY, OKLA., Nov. 11, 1908.

Council met in adjourned session with the following members present: Messrs. Highley, Workman, Helm, Corder, Peshek, Johnston, McWilliams, McDavie, Land and Byers. The Mayor being absent Mr. Mont F. Highley, President of Council and Acting Mayor, presided.

City Engineer Burke reported that the bid of R. F. Conway



Company was the lowest and best for the paving of 2nd Street from the east line of Blackwelder Avenue to the east line of Olie Avenue, Oklahoma City, Oklahoma.

Bids were as follows:

R. F. Conway Co.

Sheet Asp. Pavement, inc. 5" Portland Con. foundation,	
per sq. yd.....	\$1.95
Earth excavation, per cu. yd.....	.35
Str. Concrete Curb and gutter, 6" curb, lin. ft.....	.70
Rad. Concrete Curb and gutter, 6" curb, lin. ft.....	.75
Concrete Double Gutter, per lin. ft.....	.75
3" Oak header, per lin. ft.....	.15
Vit. Pipe in place, with backfill, per lin. ft., 10" 60c.,	
12" 80c., 18" \$1.55, 15" \$1.00	
Manholes, complete each.....	40.00
Catch Basins, each.....	20.00
Approximate Total.....	\$21,224.50
David McCormick, Approx. T.....	22,024.00
Barber Asp. P. Co. Approx. T.....	23,081.50

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co., being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call 166 vote, except Messrs. McWilliams and McDavie voting nay.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best bid for the paving of 3rd Street from the W. line of Lee Avenue to the W. line of Carey & Weaver's Addition, Oklahoma City, Oklahoma.

Bids were as follows:

R. F. Conway Co.

Sheet Asphalt Pavement, inc. 5" Portland Cement Con.	
Foundation, 5 yr. guarantee, per sq. yd.....	\$1.95
Earth Excavation, per cu. yd.....	.35
Str. Concrete curb and gutter, 6" curb, per lin. ft.....	.70
Rad. Concrete curb and gutter, 6" curb, per lin. ft.....	.75
Concrete Double Gutter, per lin. ft.....	.75
3" Oak Header, per lin. ft.....	.15
Approximate Total.....	\$2,218.50
David McCormick, Approx. Total.....	2,320.40
Barber Asp. P. Co.....	2,419.00

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote, except Messrs. McWilliams and McDavie voting nay.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best for the paving of 5th Street from the west

line of Walker to the east line of Western Avenue, Oklahoma City, Oklahoma.

Bids were as follows:

R. F. Conway Co.

Sheet Asphalt pave., inc. 5" Portland C. Concrete Foundation, 5 yr. guar. per sq. yd.....	\$1.95
Earth Excavation, per cu. yd.....	.35
Str. Concrete Curb and gutter, 6" curb, per lin. ft.....	.70
Str. Concrete Curb and gutter, 6" curb, per lin. ft.....	.70
Concrete Double Gutter, per lin. ft.....	.75
3" Oak Header.....	.15
Vit. pipe in place, with backfill, per lin. ft. 10" 60c., 12" 80c., 15" \$1.00	
Manholes, complete, each.....	40.00
167 Catch Basins, each.....	20.00
Approximate Total.....	\$22,836.25
David McCormick, Approx. Total.....	\$23,650.25
Cleveland T. P. Co., Approx. Total.....	23,742.25
Barber Asp. Pav. Co., Approx. Total.....	24,699.25
Warren Quinlan, Approx. Total.....	24,573.45

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote, except Messrs. McWilliams and McDavie voting nay.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best for the paving of 6th Street from the west line of Robinson Avenue to the E. line of Walker Avenue, Oklahoma City, Oklahoma.

Bids were as follows:

R. F. Conway Co.

Sheet Asp. Pavement inc. 5" Portland C. Con. Foundation 5 yr. guar. per sq. yd.....	\$1.95
Earth Excavation, per cu. yd.....	.35
Str. Concrete curb and gutter, 6" curb, per lin. ft.....	.70
Rad. Concrete curb and gutter, 6" curb, per lin. ft.....	.75
Resetting curb, per lin. ft.....	.20
Concrete double gutter, per lin. ft.....	.75
Concrete single gutter per lin. ft.....	.50
3" Oak Header, per lin. ft.....	.15
Vit. pipe in place, with backfill 15" per lin. ft.....	1.00
Approximate Total.....	\$10,370.00
David McCormick, Approx. T.....	10,810.20
Cleveland T. P. Co., Approx. T.....	10,798.50
Barber Asp. P. Co., Approx. T.....	11,343.50

Moved by Corder, seconded by Mr. Byers that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote, except Messrs. McWilliams, and McDavie voting nay.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best for the paving of 6th Street from the E. line of Walker Avenue to the E. line of Lee Ave., Oklahoma City, Oklahoma.

168 Bids were as follows:

#### R. F. Conway Co.

Sheet Asp. pavement, inc. 5" Portland Cement Con. foundation, 5 yr. guarantee per sq. yd.....	\$1.95
Earth Excavation, per cu. yd.....	.35
Str. Concrete curb and gutter, 6" curb, per lin. ft.....	.70
Rad. Concrete curb and gutter, 6" curb, per lin. ft.....	.75
Concrete double gutter, per lin. ft.....	.75
3" Oak Header, per lin. ft.....	.15
Vit. pipe in place, with backfill, per lin. ft., 10" 60c.; 12" 80c.	
Manholes complete each .....	40.00
Catch basins, each .....	20.00
Approximate Total .....	\$7,137.75
David McCormick, Approx. Total.....	\$7,412.25
Cleveland T. P. Co., Approx. Total.....	7,413.75
Barber Asp. Pav. Co., Approx. Total.....	7,413.75

Moved by Mr. Corder, seconded by Mr. Byers that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street.

Motion carried by unanimous roll call vote, except Messrs. McWilliams and McDavie voting nay.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best for the paving of 6th Street from the West line of Phillips Avenue to W. line of Kelley Avenue, Oklahoma City, Oklahoma.

Bids were as follows:

#### R. F. Conway Co.

Sheet Asp. Pavement, inc. 5" Portland Cement Concrete Foundation, 5 yr. guar. per sq. yd.....	\$1.95
Earth Excavation, per cu. yd.....	.35
Str. Concrete curb and gutter, 6" curb, per lin. ft.....	.70
Rad. Concrete curb and gutter, 6" curb, per lin. ft.....	.75
Concrete double gutter, per lin. ft.....	.75
3" Oak Header, per lin. ft.....	.15
Vit. Pipe in place, with backfill 10" 60c., 12" 80c., 15" \$1., per lin ft.	

Manholes complete each .....	40.00
Catch basins, each .....	20.00
Approximate Total .....	\$8,859.25
David McCormick Approximate Total .....	\$9,180.75
Cleveland T. P. Co., Approximate Total .....	9,180.00
Barber Asp. Pav. Co., Approximate Total .....	9,776.00

169 Moved by Mr. Corder, seconded by Mr. Byers that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote, except Messrs. McWilliams and McDavie voting nay.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best for the paving of 7th Street from the E. line of Stiles Avenue to the W. line of Stonewall Ave.

Bids were as follows:

#### R. F. Conway Co.

Sheet Asp. pavement inc. 5" Portland C. Concrete Foundation, 5 yr. guarantee, per sq. yd. ....	\$1.95
Earth excavation, per cu. yd. ....	.35
Rock Excavation, per cu. yd. ....	.70
Str. Concrete Curb and Gutter 6" curb, per lin. ft. ....	.70
Rad. C. Curb and Gutter 6" per lin. ft. ....	.75
Concrete Double Gutter per lin. ft. ....	.75
3" Oak Header, per lin. ft. ....	.15
Vit. pipe in place, with backfill, per lin. ft. 10" 60c., 12" 80c., 18" \$1.25, 15" \$1.00.	
Manholes complete each .....	40.00
Catch Basins, each .....	20.00
Approximate Total .....	\$29,637.75
David McCormick .....	30,388.35
Cleveland T. Pav. Co. ....	30,700.25
Barber Asp. P. Co. ....	32,143.75

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote except Messrs. McWilliams and McDavie voting nay.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best for the paving of 9th Street from E. Line of Dewey Avenue to E. line of Shartel Avenue Oklahoma City, Okla.

Bids were as follows:

#### R. F. Conway Co.

Sheet Asp. pavement inc. 5" Portland C. Con. foundation 5 yr. guar., per sq. yd. ....	\$1.95
170 Earth excavation, per cu. yd. ....	.35
Str. Concrete Curb and gutter 6" curb, lin. ft. ....	.70

Rad. Concrete Curb and gutter 6" curb, lin. ft.....	.75
Concrete Double Gutter, per lin. ft.....	.75
3" Oak Header, per lin. ft.....	.15
Vit. Pipe in place with back fill, per lin. ft., 10" 60c., 15" \$1.00.	
Manholes com. each .....	40.00
Catch basins, each .....	20.00
Approximate Total .....	\$7,928.25
David McCormick, Approx. Total.....	8,191.05
Barber Asp. P. Co.....	8,670.75
Warren Quinlan .....	8,572.50

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above street. Motion carried by unanimous roll call vote, except Messrs. McWilliams and McDavie voting nay.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best for the paving of 16th Street from E. line of Shartel Ave. to E. line of McKinley Ave., Oklahoma City, Okla.

Bids were as follows:

#### R. F. Conway Co.

Sheet Asp. pavement, inc. 5" Portland Cement C. Foundation 5 yr. guarantee, per. sq. yd.....	\$1.95
Earth Excavation, per cu. yd.....	.35
Str. Concrete curb and gutter, 6" curb lin. ft.....	.70
Rad. Concrete curb and gutter, 6" curb lin. ft.....	.75
Concrete Double Gutter, per lin. ft.....	.75
3" Oak header, per lin. ft.....	.15
Vit. pipe in place, with backfill per lin. ft. 10" 60c., 12" 80c., 15" \$1.00.	
Manholes complete, each .....	40.00
Catch Basins, each .....	20.00
Approximate Total .....	\$25,067.50
David McCormick, Approx. T.....	25,902.00
Barber Asp. Pav. Co.....	27,225.00
Warren Quinlan .....	27,045.50

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote, 171 except Messrs. McWilliams and McDavie voting nay.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best for the paving of 18th St. from W. line of Dewey Avenue to E. line of Shartel Ave.; Dewey Ave. from N. line of 17th Street to S. line of 19th St.; Lee Ave. from N. line of 17th Street to S. line of 19th Street, Oklahoma City, Oklahoma.

Bids were as follows:

## R. F. Conway Co.

Sheet Asp. pavement inc. 5" Portland C. Concrete Found.	
5 yr. guarantee, per sq. yd. ....	\$1.93
Earth Excavation, per cu. yd. ....	.35
Str. concrete curb and gutter, 6" curb lin. ft. ....	.70
Rad. concrete curb and gutter, 6" curb lin. ft. ....	.75
Concrete double gutter, per lin. ft. ....	.75
3" Oak header, per lin. ft. ....	.15
Vit. pipe in place with backfill, per lin. ft., 10" 60c, 12"	
80c, 21" 1.75, 24" \$2.30.	
Manholes, complete, each .....	\$40.00
Catch Basins, each .....	20.00
Approximate Total .....	\$18,349.75
David McCormick Approx. Total .....	19,062.65
Barber Asp. P. Co., Approx. Total .....	19,943.05
Warren Quinlan, Approx. Total .....	19,836.30

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described streets. Motion carried by unanimous roll call vote, except Messrs. McWilliams and McDavie voting nay.

City Engineer Burke reported that the bid of R. F. Conway Company was the lowest and best for the paving of 19th Street from the E. line of Dewey Ave. to the E. line of Western Ave., Oklahoma City, Oklahoma.

Bids were as follows:

## R. F. Conway Co.

Sheet Asp. pavement, inc. 5" Portland Cement Con.	
Foundation, 5 yr. guarantee, per sq. yd. ....	\$1.97
Earth Excavation, per cu. yd. ....	.35
Concrete curb and gutter, str. 6" curb per lin. ft. ...	.70
172 Concrete curb and gutter, rad. 6" curb per lin. ft. ...	.75
Concrete double gutter, per lin. ft. ....	.75
3" Oak header, per lin. ft. ....	.15
Vit. pipe in place, with backfill per lin. ft. 10" 60c, 12"	
80c, 15" \$1, 24" \$2.30, 27" \$2.60.	
Manholes, complete, each .....	\$40.00
Catch Basins, each .....	20.00
Approximate total .....	\$18,744.50
David McCormick, Approx. T. ....	19,241.70
Barber Asp. P. Co. ....	20,380.50
Warren Quinlan .....	20,123.50

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Company being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote, except Messrs. McWilliams and McDavie voting nay.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best for the paving of Walker Ave. from the N. line of 13th Street to the N. line of 16th St., Oklahoma City, Okla.

Bids were as follows:

#### R. F. Conway Co.

Sheet Asp. pavement, inc. 5" Portland C. Concrete Foundation 5 yr. guarantee, per sq. yd.	\$1.95
Earth Excavation, per cu. yd.	.35
Str. Con. Curb and Gutter, six" curb, lin. ft.	.70
Rad. Con. Curb and Gutter six" curb, lin. ft.	.75
Concrete Double gutter, per lin. ft.	.75
3" Oak Header, per lin. ft.	.15
Approximate Total	\$8,107.25
David McCormick, Approx. Total	\$8,352.00
Cleveland T. P. Co., Approx. Total	\$8,605.00
Barber Asp. P. Co., Approx. Total	\$8,889.25

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote except Messrs. McWilliams and McDavie voting nay.

173 City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best for the paving of Classen Blvd. from the N. line of 16th St. to the N. line of 37th Street, Oklahoma City, Okla.

Bids were as follows:

#### R. F. Conway Co.

Sheet Asp. pavement inc. 5" Portland C. Con. Foundation, 5 yr. guar. per sq. yd.	\$2.10
Earth Excavation, per cu. yd.	.35
Rock Excavation, per cu. yd.	.70
Embankment, per cu. yd.	.20
Str. Concrete curb and gutter 6" c. per lin. ft.	.65
Rad. Concrete curb and gutter 6" c. per lin. ft.	.75
Str. Concrete curb and gutter 6" c. per lin. ft.	.65
Rad. Concrete curb and gutter 6" c. per lin. ft.	.70
Resetting curb, per lin. ft.	.20
Con. double gutter per lin. ft.	.75
3" Oak Header, per lin. ft.	.15
Vit. pipe in place, with backfill per lin. ft., 10" 60c 12" 80c, 18" \$1.55, 21" \$1.75, 24" \$2.30, 15" \$1.00.	
Manholes complete, each	40.00
Catch basins, each	20.00
Approximate total	\$139,685.00
David McCormick's Approx. total	145,373.00
Barber Asp. Pav. Co. Approx. total	145,293.00



Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote except Messrs. McWilliams and McDavie voting nay.

City Engineer reported that the bid of R. F. Conway Co. was the lowest and best for the paving of California Ave. from the E. line of Shartel Ave. to E. line of Western Avenue, Oklahoma City, Oklahoma.

Bids were as follows:

#### R. F. Conway Co.

Sheet Asp. pavement, inc. 5" Portland C. Concrete Found.	
5 yr. guarantee, per sq. yd.	\$1.95
Earth Excavation, per cu. yd.	.35
Str. Concrete curb and gutter, 6" c. lin. ft.	.70
174 Rad. Concrete curb and gutter, 6" c. per lin. ft.	.75
Resetting curb, per lin. ft.	.20
Concrete double gutter, per lin. ft.	.75
Concrete single gutter, per lin. ft.	.50
3" Oak Header, per lin. ft.	.15
Vit. pipe in place, with backfill per lin. ft., 10" 60c, 12" 80c	
Manholes complete, each	\$40.00
Catch Basins, complete, each	20.00
Approximate total	\$10,746.00
David McCormick, Approximate total	11,154.50
Barber Asp. P. Co., Approximate total	11,776.00

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co., being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote except Messrs. McWilliams and McDavie voting nay.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best for the paving of Washington Ave. from W. line of Broadway to E. line of Robinson, Oklahoma City, Okla.

Bids were as follows:

#### R. F. Conway Co.

Sheet Asp. pavement inc. 5" Portland C. Concrete Found.	
ation, 5 yr. guar. per sq. yd.	\$1.95
Earth Excavation, per cu. yd.	.35
Str. Concrete curb and gutter, 6" curb lin. ft.	.70
Rad. Concrete curb and gutter, 6" curb lin. ft.	.75
Concrete double gutter, per lin. ft.	.75
3" Oak Header, per lin. ft.	.15
Approximate total	\$3,006.25
David McCormick, Approx. total	3,126.65
Cleveland T. P. Co., Approx. total	3,136.40
Barber Asp. P. Co., Approx. total	3,464.00
Warren Quinlan, Approx. total	3,378.00

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote, except Messrs. McWilliams and McDavie voting nay.

175 City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best for the paving of Washington Ave. from the W. line of Robinson Avenue to E. line of Walker St., Oklahoma City, Oklahoma.

Bids were as follows:

#### R. F. Conway Co.

Sheet Asp. pavement inc. 5" Portland C. Concrete Foundation, 5 yr. guar. per sq. yr.	\$1.95
Earth Excavation, per cu. yd.	.35
Str. Concrete curb and gutter, 6" curb lin. ft.	.70
Rad. Concrete curb and gutter, 6" curb lin. ft.	.75
Concrete double gutter, per lin. ft.	.75
3" Oak Header, per lin. ft.	.15
Vit. pipe in place, with backfill, per lin. ft.	
10" 60c.	
Catch Basins, each.	\$20.00
Approximate total.	\$11,558.50
David McCormick, Approx. total.	11,005.95
Cleveland T. P. Co., Approx. total.	11,010.50
Barber Asp. P. Co., Approx. total.	11,629.60
Warren Quinlan, Approx. total.	11,451.27

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote, except Messrs. McWilliams and McDavie voting nay.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best for the paving of Phillips Avenue from N. line of 4th Street to N. line of 10th Street, Oklahoma City, Okla.

Bids were as follows:

#### R. F. Conway Co.

Sheet Asp. pavement inc. 5" Portland C. Concrete Foundation, 5 yr. guaranteed, per sq. yd.	\$1.97
Earth Excavation, per cu. yd.	.35
Str. Concrete curb and gutter, 6" curb lin. ft.	.70
Rad. Concrete curb and gutter, 6" curb lin. ft.	.75
Concrete double gutter, per lin. ft.	.75
3" Oak Header, per lin. ft.	.15
Vit. pipe in place with backfill per lin. ft.,	
10" 16c, 12" 80c.	
176 Manholes, complete, each.	\$40.00
Catch Basins, each.	20.00
Approximate total.	\$15,543.50
David McCormick, Approx. total.	15,992.40
Barber Asp. P. Co.	16,882.00

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co. being the lowest and best that their bid be accepted and they be awarded the contract for the paving of the above described street. Motion carried by unanimous roll call vote, except Messrs. McWilliams and McDavie voting nay.

*Minutes of Meeting of City Council, Nov. 16, 1908, Approving Contracts and Bonds of R. F. Conway Co. for Paving Certain Streets.*

(Council Journal No. 12.)

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OKLAHOMA CITY, OKLA., Nov. 16, 1908.

Council met in Regular Session with the Mayor and following members present: Messrs. Highley, Workman, Helm, Corder, Peshek, Johnston, McDavid, Land and Byers. Mr. McWilliams came in later.

Contract and bond of R. F. Conway Co. were read for the paving of Third Street from the west line of Robinson Avenue to W. line of Lee Avenue, Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of 11th Street from W. line of A. T. & S. F. Ry. to E. line of Robinson; Dale Ave. from N. line of Park Place to S. line of 13th St.; Park Place from E. line of Broadway to E. line of Dale Ave., Oklahoma City, Okla.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

177 Contract and bond of R. F. Conway Co. were read for the Paving of 11th St. from E. line of Geary Ave. east 189.2 feet, Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Land voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of 12th Street from the E. line of Geary Ave. East 189.2 feet, Oklahoma City, Okla.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of 14th St. from E. line of Broadway to E. line of Robinson Ave.;

Broadway from N. line of 13th St. to S. line of 14th St., Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of Byers Ave. from the North line of 3rd Street to the S. line of 4th Street, Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of Jamestown Ave. from the W. line of Western Ave. to the E. line of Klein Avenue, Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of Shartel Avenue from the North line of 4th Street to the S. line of 8th St., Oklahoma City, Okla.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of Shartel Avenue from the N. line of 8th St. to S. line of 11th St., Oklahoma City, Okla.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of Shartel Avenue from the N. line of 19th Street to 296 ft. N. of N. line of 25th St., Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of Western Ave. from the N. line of Main Street to the N. line of 17th Street, Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of California Avenue from the E. line of Dewey Ave. to E. line of Shartel Ave., Oklahoma City, Okla.

179 Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of Lee Ave. from the S. line of Main St. to the N. line of Reno Ave., Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of Oklahoma Ave. from the N. line of 2nd Street to the S. line of 3rd Street, Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of Stiles Avenue from the S. line of 1st Street to the S. line of 3rd Street, Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of Shartel Avenue, from N. line of 16th St. to S. line of 19th St. Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote.

Contract and bond of R. F. Conway Co. were read for the paving of Walker Avenue from the N. line of 4th Street to the South line of 6th Street, Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

180 Contract and bond of R. F. Conway Co. were read for the paving of Broadway from the N. line of Washington Ave. to the E. and W. alley between Choctaw and Tena Avenues, Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting nay.

Contract and bond of R. F. Conway Co. were read for the paving of Lindsay Avenue from the North line of 4th Street to the S. line of 5th Street, Oklahoma City, Oklahoma.

Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion car-

ried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers, voting nay.

HENRY M. SCALES, *Mayor*.

Attest:

GEO. HESS,  
*City Clerk*.

*Contract Tendered by David McCormick to City of Oklahoma City for Paving Nineteenth Street.*

### Contract.

This Contract made and entered into this the 4th day of November, 1908, by and between David McCormick of St. Louis, Mo., hereinafter called The Contractor, party of the first part, and the City of Oklahoma City, Oklahoma, hereinafter called The City, party of the second part.

Witnesseth: That whereas the said contractor is the lowest and best bidder for making improvements under and by virtue of the provisions of a resolution passed by the City Council of the City of Oklahoma City, on the 21st day of September, 1908, Nineteenth Street from the East line of Dewey Avenue to the East line of Western Avenue by constructing and guaranteeing for a period of 10 years, as hereinafter provided, an asphalt pavement on the streets and avenues and the unpaved portions thereof as above described, and in the manner provided for in said resolution and the specifications of the City Engineer, approved at the meeting of City Council 19th day of October, 1908.

Now Therefore, the said Contractor hereby covenants and agrees to furnish all the material and to perform all the work necessary to complete said improvements according to the terms of said resolution and in conformity to the plans and specifications on file in the City Clerk's Office above referred to, to the satisfaction and acceptance of the City Engineer and the City Council of said City; and after the completion and acceptance of the same it shall be maintained and kept in good repair for a period of 10 years by the contractor, at its own expense during said period without further compensation than that provided for in this contract for the first cost of said work, all as provided in the said specifications.

The said Contractor agrees to commence work within — days from the time this contract is signed, and the work shall be completed to the satisfaction and acceptance of the City Engineer and the Paving Committee of the City Council of said City within six months after commencement of said work. Working days shall include all days except only Sundays and legal holidays and such others as are hereinafter excepted.

It is further agreed and understood by the parties hereto that the work herein contemplated shall be commenced at such point or points and prosecuted in such manner and with such force as the City Engineer of the City may direct, and for each working day beyond the time fixed in this contract for the final completion of this

improvement, such completion shall be delayed by the Contractor; said Contractor shall pay to the said City the sum of Twenty-five — (\$25.00) per day to cover continuing expense of engineer and inspectors.

It is further expressly agreed and understood by and between the parties hereto that this contract is made subject to the following stipulations and conditions:

1. The party of the first part shall do all the work embraced in this contract so as to conform to the directions of the City Engineer as to the order of time in which the different parts of the work shall be done, as well as to all his other instructions as to the mode of doing the same, not inconsistent with the specifications.

2. Whenever the Contractor is not present on the work, orders will be given by the City Engineer to the Superintendents of Overseers in immediate charge thereof, and shall by them be received and obeyed; and if any person employed on the work shall refuse or neglect to obey the instructions of said City Engineer, in any way relating to the work, or shall appear to the said City Engineer to be incompetent, disorderly or unfaithful, he shall, upon the requisition of said City Engineer be at once discharged and not again employed on any part of the work.

3. Any work not herein or in the specifications specified which may be fairly implied as included in this contract, of which the City Engineer shall be the judge, shall be done by the Contractor without extra charge beyond the contract prices.

4. The working days on this contract lost in consequence of injunction or Court proceedings, or bad weather, or by grading, or trenching by other contractors, corporations or individuals over whom the party of the first part has no control, or organized general strikes, or the burning of the plant where the material for this contract is prepared shall not be held to be working days and shall be added to the number of days specified in this contract within which the work shall be completed.

5. If, in the opinion of the Engineer, the Contractor at any time during the progress of this work, is not prosecuting the work with sufficient force to insure its completion within the time specified in this contract, he may notify the contractor by written notice to employ such additional force as he deems necessary; and on the failure of said Contractor to comply with said notice within three days after its delivery the said City Engineer may put on such additional force at the cost of the party of the first part; or he may at his option, declare such contract annulled, but such declaration must be confirmed and ratified by vote of the council, before having any force or effect; and the power is reserved to the City Engineer to sustain or annul this contract, or to suspend the doing of any work thereunder at any time for any failure on the part of the Contractor to fulfill the same, or for other good cause; and any action of the City Engineer in suspending or annulling this contract or suspending the doing of the work thereunder and his decision as to the existence of the cause or reason for such annulment or suspension shall be conclusive — to the existence of such cause or reason in



any controversy or litigation between the parties hereto or others claiming under them, unless the Contractor shall appeal from such order or action of the Engineer to the Council without delay and upon such appeal said Council shall promptly take up and decide the matters in controversy and the decision of the council concerning such matters shall be final, unless the Contractor shall commence legal proceedings within five (5) days from the decision of the council and if this contract be suspended or annulled, the party of the first part shall not be entitled to anything on account of damages thereby occasioned, unless it shall appear that such annulment or suspension was without good cause, nor shall such annulment or suspension in any wise effect the right of the city to damages and penalty claimed by it on account of the failure of said contractor, but said abatement or annulment or suspension must be ratified by the City Council before being of any force or effect.

183 6. The Contractor will be required to observe all city ordinances in relation to obstructing the streets, maintaining the signals, keeping open passageways and protecting the same where exposed, and generally to obey all laws and ordinances controlling or limiting those engaged on the work; and the Contractor hereby expressly agrees to [i-demnify] and save harmless the City of Oklahoma City from all suits and actions, of every nature and description, brought against the said City, for, or on account of any injuries or damages received or sustained by any party or parties or by or from the acts of the Contractor or his servants or agents in the performance of their duties in doing the work herein contracted for, or in consequence of any negligence in grading the same or in any improper materials used in the construction, or by or on account of any acts or omissions of the said party of the first part, its servants or agents.

7. The party of the first part further agrees that it will pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work, and for all material used therein. It is hereby further agreed that the Contractor shall pay engineering, printing, appraisers, and all other fees provided for by the ordinance of said city, in cash at the expiration of each and every month.

8. To prevent all disputes and litigations, it is further agreed by the parties hereto that the City Engineer and Paving Committee shall in all cases determine the amount and quality of the several kinds of work which are to be paid for under this contract; and they shall decide all questions which may arise relative to the execution of the work under this contract on the part of the Contractors, subject however to confirmation by the Council in case of appeal to Council.

9. This contract is entered into subject to the approval or rejection of the Council of the City of Oklahoma City, and it shall not bind either party until so approved and confirmed and is subject to all city ordinances now in force relating to such matters.

184 10. It is further expressly agreed that the City shall not be held liable for any delay or stoppage of said work by reason of any injunction or other legal proceedings whatever except as herein provided.

11. It is further agreed that in the doing of the work under this contract eight (8) hours shall constitute a day's work as provided in Ordinance No. 763, and the laws of the State of Oklahoma, and no person doing work under this contract shall be required to work longer than eight (8) hours each day.

12. In consideration of the completion by the said Contractor, of all work embraced in this contract, in strict conformity with the specifications hereinbefore referred to, the city agrees to pay to the said Contractor the following prices, viz:

Sheet asphalt pavement, inc.

5 inch Portland cement concrete foundation . . . per sq. yd.	\$ 2.09
Earth Excavation . . . . . per sq. yd.	\$ .35
Rock Excavation . . . . . per cu. yd.	\$ . . . .
Embankment . . . . . per cu. yd.	\$ . . . .
Concrete curb and gutter, str. 6" curb . . per lin. ft.	\$ .74
Concrete curb and gutter, rad. 6" curb . . per lin. ft.	\$ .74
Str. concrete curb and gutter, 4" curb . . per lin. ft.	\$ . . . .
Rad. concrete curb and gutter, 4" curb . . per lin. ft.	\$ . . . .
Resetting concrete curb and gutter . . . per lin. ft.	\$ . . . .
Resetting stone curb . . . . . per lin. ft.	\$ . . . .
Concrete double gutter . . . . . per lin. ft.	\$ .74
Concrete single gutter . . . . . per lin. ft.	\$ . . . .
3" Oak header . . . . . per lin. ft.	\$ .15
Vit. pipe in place, inc., backfill . . . . per lin. ft.	\$ . . . .
10 inch . . . . . per lin. ft.	\$ .60
12 inch . . . . . per lin. ft.	\$ .80
15 inch . . . . . per lin. ft.	\$ 1.00
18 inch . . . . . per lin. ft.	\$ . . . .
21 inch . . . . . per lin. ft.	\$ . . . .
24 inch . . . . . per lin. ft.	\$ 2.30
27 inch . . . . . per lin. ft.	\$ 2.60
Manholes, complete . . . . . Each	\$40.00
Catch Basins . . . . . Each	\$20.00

The City further agrees to pay for said work in street improvement bonds issued by the city, which the Contractor agrees to accept at par, the forms of which are to be determined by the parties hereto, and embraced in an ordinance or ordinances to be passed by the City Council.

The City further agrees that it will cause the levy and collection of assessments against the property liable to the same under the laws of the State of Oklahoma, and will levy and collect annually, in the manner provided by the laws of the State of Oklahoma, a sufficient tax to pay the bonds so to be issued, with the annual interest thereon as they shall become due; and the city agrees to pay out of the funds when so collected from said tax levy said bonds and interest promptly when due to the holders of such securities at the office of the City Treasurer of Oklahoma City, and the city agrees to cause to be made promptly the annual collections, as provided by law, of a sufficient

amount of money to pay the securities so issued together with all interest charges.

It is further agreed and understood by the parties hereto that no deductions shall be made for the delay in the progress of the work as are occasioned by the weather preventing the contractor from pursuing the same and the said City Engineer shall determine whether or not the weather conditions are such that the work can be carried on.

It is further agreed that all repairs and all pavement required to be made by the contractor during the guarantee period shall be made with materials similar and equal to, and laid in the manner of those described in the specifications for the original improvement. The said contractor hereby expressly promises and agrees to keep said improvements in a first class condition for a period of 10 years from and after the time of the completion of the same and its acceptance by the city, and agrees further that if it shall fail to do so in any instance, upon notice of ten (10) days in writing, given by the Engineer of said city, or the paving committee of the council of said City, to it, such repairs or reconstruction shall be done by said City, and said City is hereby authorized to make such repairs or reconstruction by contract or otherwise, and to pay for the same out of the improvement bonds held by said City as a guarantee for the maintenance of said improvement, or in case said contractor gives bond, then, by suit upon said bond, the cost thereof, and the said contractor will pay the cost of such repairs or reconstruction, together with all expense occurred in the recovery thereof, including a reasonable attorney's fee in making such collection, but that no action in any instance for that purpose shall be a bar to any further or future action on account of any past, future or further failure on the part of the contractor to make such repairs or improvements, except that in case the full amount of the penal sum of the bond for maintenance of such work be exhausted.

It is further agreed that the city shall not in any case become liable for the payment of the cost of paving the spaces occupied by the street car tracks, should such places be paved by the contractor.

It is further agreed that the contractor shall at the time of the approval of this contract by the Mayor and Council of the  
186 city furnish a construction bond in the amount of Twenty (20%) per cent. of the total amount of the contract price for the faithful completion of the work in strict conformity to the plans and specifications of the said City Engineer, a copy of said bond is hereto attached; and that upon the approval of said bond by the Mayor and Council this contract shall become effective.

Said contractor hereby promises and agrees to permit said City to retain certificates to the amount of ten (10) per cent. of the Contract price as surety that said contractor will keep such improvements in good repair for the full period of 10 years from and after the acceptance of same by said city, and will in all respects perform the contract with reference to such repairs and improvements for the period of 10 years. It is agreed that whatever interest is paid upon such warrants that the same will be turned over immediately

to said contractor, and whenever the principal upon said certificates is paid the same shall be held by the city for the full period but shall be deposited with the City Treasurer as a separate fund upon a time deposit and the interest thereon shall accrue to the said contractor. At the expiration of the said 10 years guaranty period all certificates retained herein and all money paid upon said certificates and all interest accrued upon said time deposit herein provided shall be delivered to said contractor. Said contractor shall have the right in lieu of the foregoing surety to at any time furnish a good and sufficient maintenance bond whereupon the same being accepted by said city, all certificates shall be returned to said contractor.

The city agrees to pass and adopt such ordinances, orders and resolutions and to take such other proceedings, in conformity with the laws of the State of Oklahoma, as will give to the bonds, which are paid to the contractor under this agreement the highest possible market value and as will best and most speedily give effect to the provisions of the statute and this contract and the Officers and Employés of the city shall at all times and by all proper means and — facilitate the work to be performed hereunder.

The City shall perform all the obligations imposed upon it by this contract and the laws of the state of Oklahoma promptly and without unnecessary delay, particularly with reference to the levying and collection of the special assessments and payment of the proceeds thereof contemplated by this agreement and the laws of the state above mentioned.

The city agrees that on all cuts made in the said pavement that it will require, before issuing a permit for any such cut, a deposit with

187 the City Engineer of a sum of money covering the repairing permits issued by the City Engineer within thirty (30) days after the receipt of a notice from the City Engineer notifying the contractor of the cuts, and the city shall pay to the contractor out of the sum deposited with the City Engineer when the permits are issued, at the prices above specified, for the actual amount of repairs made; said sums to be paid to the contractor when the work is completed and accepted by the City Engineer.

In Witness Whereof, the contractor David McCormick, has caused these presents to be signed by its president and attested by its secretary, and the seal of the corporation to be affixed hereto, and the City of Oklahoma has caused these presents to be signed by its Mayor and attested by its Clerk, and the seal of the city to be affixed hereto, the day and year first above written.

DAVID McCORMICK,

By ———, *Secretary.*

THE CITY OF OKLAHOMA CITY,  
OKLAHOMA,

By ———, *Mayor.*

Attest:

\_\_\_\_\_,  
\_\_\_\_\_,  
\_\_\_\_\_,

*City Clerk of City of Oklahoma City, Okla.*

\* \* \* \* \*

(Here follow 17 contracts of David McCormick for paving certain streets, each of said contracts being the same in form as the contract of David McCormick for paving Nineteenth street, heretofore printed, only that said 17 contracts cover different streets and are for different prices.)

*Rules of City Council, Oklahoma City.*

OKLAHOMA CITY, OKLAHOMA, April 9th, 1901.

Council met as per adjournment with the Mayor and following Councilmen present: Messrs. McCartney, Gault, Dunn, Welsh, Swatek, Starks, Hagen, Hale and Geary. The following rules for the Government of the Council were submitted by Mr. Hagan.

\* \* \* \* \*

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Rule 12.

A question may be reconsidered at any time during the same meeting or during the first meeting thereafter. No motion shall be reconsidered more than once nor shall a vote to reconsider be reconsidered, but any member of the Council who has voted in the affirmative shall have the right to move for a reconsideration.

\* \* \* \* \*

Rule 19.

In the absence of any other rule the council shall be governed by Cushing's Manual.

Moved by Mr. Gault that the rules as read by Clerk be adopted.

Moved to amend by Mr. Welsh by striking out the last paragraph of Rule 13. Amendment lost by the following roll call vote: Ayes—Messrs. Welsh, Swatek, Hale. Noes—Messrs. McCartney, Gault, Dunn, Hagan and Geary. The question was put on original motion and carried by unanimous roll call vote.

Approved:

C. G. JONES, *Mayor.*

Attest:

T. A. BLAISE, *City Clerk.*

\* \* \* \* \*

(Here follow Contracts and Bonds of R. F. Conway Company which are omitted because they are the same in form as the contract and Bond immediately following this recitation except as to streets and amounts.)

*Contract Between R. F. Conway Co. and City of Oklahoma City for Paving Nineteenth Street and Construction Bond Attached.*

Contract.

This Contract Made and entered into this 12th day of November, 1908, by and between R. F. Conway of Chicago, Illinois, a corpora-

tion, hereinafter called the Contractor, party of the first part, and the City of Oklahoma City, Oklahoma, hereinafter called The City, party of the second part.

Witnesseth: That whereas the said contractor is the lowest and best bidder for making improvements under and by virtue of the provisions of a resolution passed by the City Council of the  
189 City of Oklahoma City, on the 21st day of September, 1908.

For the paving of Nineteenth Street from the East Line of Dewey Avenue to the East Line of Western Avenue by constructing and guaranteeing for a period of 5 years, as hereinafter provided, an asphalt pavement on the streets and avenues and the unpaved portions thereof above described, and in the manner provided for in said resolution and the specifications of the City Engineer, approved at the meeting of City Council October 19, 1908.

Now, Therefore, the said Contractor hereby covenants and agrees to furnish all the material and to perform all the work necessary to complete the said improvements according to the terms of said resolution and in conformity to the plans and specifications on file in the City Clerk's office above referred to, to the satisfaction and acceptance of the City Engineer and the City Council of said City; and after the completion and acceptance of the same it shall be maintained and kept in good repair for a period of five years by the Contractor, at its own expense during said period without further compensation than that provided for in this contract for the first cost of said work, all as provided in the said specifications:

The said Contractor agrees to commence work within 15 days from the time this contract is confirmed by the Council of the City, and the work shall be completed to the satisfaction and acceptance of the City Engineer and the Paving Committee of the City Council of said City within One Hundred Sixty-Five (165) working days from and after the approval of this contract. Working days shall include all days except only Sundays and legal holidays and such others as are hereinafter excepted.

It is further agreed and understood by the parties hereto that the work herein contemplated shall be commenced at such point or points and prosecuted in such manner and with such force as the City Engineer of the City may direct, and for each working day beyond the time fixed in this contract for the final completion of the improvement, such completion shall be delayed by the Contractor; said Contractor shall pay to the said City the sum of Twenty-five (\$25.00) Dollars per day to cover continuing expense of engineer and inspectors.

It is further expressly agreed and understood by and between the parties hereto that this contract is made subject to the following stipulations and conditions:

1. The party of the first part shall do all the work embraced in this contract so as to conform to the directions of the City Engineer as to the order of time in which the different parts of the work shall be done, as well as to all his other instructions  
190 as to the mode of doing the same, not inconsistent with the specifications.



2. Whenever the Contractor is not present on the work, orders will be given by the City Engineer to the Superintendents or Overseers in immediate charge thereof, and shall by them be received and obeyed; and if any person employed on the work shall refuse or neglect to obey the instructions of said City Engineer, in any way relating to the work, or shall appear to the said City Engineer to be incompetent, disorderly or unfaithful, he shall, upon the requisition of said City Engineer be at once discharged and not again employed on any part of the work.

3. Any work not herein or in specifications specified which may be fairly implied as included in this contract, of which the City Engineer shall be the judge, shall be done by the Contractor without extra charge beyond the contract prices.

4. The working days on this contract lost in consequence of injunction or Court proceedings, or bad weather, or by grading, or trenching by other contractors, corporations or individuals over whom the party of the first part has not control or organized general strikes, or the burning of the plant where the material for this contract is prepared shall not be held to be working days and shall be added to the number of days specified in this contract within which the work shall be completed.

5. If, in the opinion of the Engineer, the Contractor at any time during the progress of the work, is not prosecuting the work with sufficient force to insure its completion within the time specified in this contract, he may notify the Contractor by written notice, to employ such additional force as he deems sufficient; and on the failure of said Contractor to comply with such notice within three days after its delivery the said City Engineer may put on such additional force at the cost of the party of the first part; or he may at his option declare such contract annulled, but such declaration must be confirmed and ratified by vote of the council, before having any force or effect; and the power is reserved to the City Engineer to sustain or annul this contract, or to suspend the doing of any work thereunder at any time for any failure on the part of the Contractor to fulfill the same, or for other good cause; and any action of the City Engineer in suspending or annulling this contract or suspending the doing of the work thereunder and his decision as to the existence of the cause or reason for such annulment or suspension shall be conclusive as to the existence of such cause or reason in any controversy or litigation between the parties hereto or others claiming under them, unless the Contractor shall appeal

191 from such order or action of the Engineer to the Council without delay and upon such appeal said Council shall promptly take up and decide the matters in controversy and the decision of the council concerning such matters shall be final unless the Contractor shall commence legal proceedings within five (5) days from the decision of the Council and if this contract be suspended or annulled the party of the first part shall not be entitled to anything on account of damages thereby occasioned unless it shall appear that such annulment or suspension was without good cause, nor shall such annulment or suspension in any wise affect



the right of the city to damages and penalty claimed by it on account of the failure of said contractor, but said abatement or annulment or suspension must be ratified by the City Council before being of any force or effect.

6. The Contractor will be required to observe all city ordinances in relation to obstructing the streets, maintaining the signals, keeping open passageways and protecting the same where exposed, and generally to obey all laws and ordinances controlling or limiting those engaged on the work; and the Contractor hereby expressly agrees to indemnify and save harmless the City of Oklahoma City from all suits and actions, of every nature and description brought against the said city for, or on account of any injuries or damages received or sustained by any party or parties or by or from the Contractor or his servants or agents in the performance of their duties in doing the work herein contracted for, or in consequence of any negligence in grading the same, or in any improper materials used in its construction, or by or on account of any acts or omissions of the said party of the first part, its servants or agents.

7. The party of the first part further agrees that it will pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work and for all materials used therein. It is hereby further agreed that the Contractor shall pay engineering, printing, appraisers and all other fees provided for by the ordinances of said city, in cash at the expiration of each and every month.

8. To prevent all disputes and litigations, it is further agreed by the parties hereto that the City Engineer and Paving Committee shall in all cases determine the amount and quality of the several kinds of work which are to be paid for under this contract; and they shall decide all questions which may arise relative to the execution of the work under this contract on the part of the Contractor, subject, however, to confirmation by the Council in case of appeal to Council.

It is further agreed that the Contractor will use all of the local labor possible in the construction of the work embraced in this contract.

192 9. This contract is entered into subject to the approval or rejection of the Council of the City of Oklahoma City, and shall not bind either party until so approved and confirmed and is subject to all city ordinances now in force relating to such matters.

10. It is further expressly agreed that the City shall not be held liable for any delay or stoppage of said work by reason of any injunction or other legal proceedings whatever except as herein provided.

11. It is further agreed that in the doing of the work under this contract eight (8) hours shall constitute a day's work as provided in Ordinance No. 763, and the laws of the State of Oklahoma, and no person doing work under this contract shall be required to work longer than eight (8) hours each day.

12. In consideration of the completion by the Contractor, of all work embraced in this contract, in strict conformity with the

specifications hereinbefore referred to, the city hereby agrees to pay to the said Contractor the following prices, viz:

Sheet asphalt pavement, inc.		
5 inch Portland cement concrete foundation	per sq. yd.	\$ 1.95
Earth excavation	per cu. yd.	\$ .35
Rock excavation	per cu. yd.	\$ .
Embankment	per cu. yd.	\$ .
Concrete curb and gutter str. 6" curb	per lin. ft.	\$ .70
Concrete curb and gutter, rad. 6" curb	per lin. ft.	\$ .75
Str. concrete curb and gutter, 4" curb	per lin. ft.	\$ .
Rad. concrete curb and gutter, 4" curb	per lin. ft.	\$ .
Resetting concrete curb and gutter	per lin. ft.	\$ .
Resetting stone curb	per lin. ft.	\$ .
Concrete double gutter	per lin. ft.	\$ .75
Concrete single gutter	per lin. ft.	\$ .
3" Oak header	per lin. ft.	\$ .15
Vit. pipe in place, inc., backfill	per lin. ft.	\$ .
10 inch	per lin. ft.	\$ .60
12 inch	per lin. ft.	\$ .80
15 inch	per lin. ft.	\$ 1.00
18 inch	per lin. ft.	\$ .
21 inch	per lin. ft.	\$ .
24 inch	per lin. ft.	\$ 2.30
27 inch	per lin. ft.	\$ 2.60
Manholes, complete	Each	\$40.00
Catch basins	Each	\$20.00

The City further agrees to pay for all of said work in Street Improvement bonds issued by the city, which the Contractor agrees to accept at par, the forms of which are to be determined by  
193 the parties hereto and embraced in an ordinance or ordinances to be passed by the City Council.

The City further agrees that it will cause the levy and collection of assessments against the property liable to the same under the laws of the State of Oklahoma, and will levy and collect annually, in the manner provided by the laws of the State of Oklahoma, a sufficient tax to pay the bonds so to be issued, with the annual interest thereon as they shall become due; and the city agrees to pay out of the funds when collected from such tax levy said bonds and interest promptly when due to the holders of such securities at the office of the City Treasurer of Oklahoma City, and the city agrees to cause to be made promptly the annual collections, as provided by law, of a sufficient amount of money to pay the securities so issued, together with all interest charges.

It is further agreed and understood by the parties hereto that no deductions shall be made for such delays in the progress of the work as are occasioned by the weather preventing the contractor from pursuing the same, and the said City Engineer shall determine whether or not the weather conditions are such that the work can be carried on.

It is further agreed that all repairs and all pavement required to be made by the contractor during the guarantee period shall be made with materials similar and equal to, and laid in the manner of those described in the specifications for the original improvement. The said contractor hereby expressly promises and agrees to keep said improvements in a first class condition for a period of five years from and after the time of the completion of the same and its acceptance by the city, and agrees further that if it shall fail to do so in any instance, upon notice of ten (10) days in writing given by the Engineer of said city, or the paving committee of the Council of said City, to it, such repairs or reconstruction shall be done by said City, and said City is hereby authorized to make such repairs or reconstruction by contract or otherwise, and to pay for the same out of the improvement bonds held by said City as a guarantee for the maintenance of said improvement, or in case said contractor gives bond, then, by suit upon said bond, the cost thereof, and the said contractor will pay the cost of such repairs or reconstruction, together with all expense incurred in the recovery thereof, including a reasonable attorney's fee in making collection, but that no action in any instance for that purpose shall be a bar to any further or future action on account of any past, future or further

194 failure on the part of the contractor to make such repairs or improvements, except that in case the full amount of the penal sum of the bond for maintenance of such work be exhausted.

It is further agreed that the city shall not in any case become liable for the payment of the cost of paving the spaces occupied by the street car tracks, should such spaces be paved by the contractor.

It is further agreed that the contractor shall at the time of the approval of this contract by the Mayor and Council of the city furnish a construction bond in the amount of Twenty (20%) per cent. of the total amount of the contract price for the faithful completion of the work in strict conformity to the plans and specifications of the said City Engineer, a copy of said bond is hereto attached; and that upon the approval of said bond by the Mayor and Council this contract shall become effective.

Said contractor hereby promises and agrees to permit said city to retain certificates to the amount of ten (10) per cent. of the contract price as surety that said contractor will keep such improvements in good repair for the full period of five years from and after the acceptance of same by said city, and will in all respects perform the contract with reference to such repairs and improvements for the period of five years. It is agreed that whatever interest is paid upon said warrants that the same will be turned over immediately to said contractor, and whenever the principal upon said certificates is paid the same shall be held by the city for the full period but shall be deposited with the City Treasurer as a separate fund upon a time deposit and the interest thereon shall accrue to said contractor. At the expiration of the said five years guaranty period all certificates retained herein and all money paid upon said certificates and all interest accrued upon said time deposit herein provided shall be delivered to said contractor. Said contractor shall have the right in

lieu of the foregoing surety to at any time furnish a good and sufficient maintenance bond whereupon the same being accepted by said city, all certificates shall be returned to said contractor.

The city agrees to pass and adopt such ordinances, orders and resolutions and to take such other proceedings, in conformity with the laws of the State of Oklahoma, as will give to the bonds, which are paid to the contractor under this agreement the highest possible market value and as will best and most speedily give effect to the provisions of the statute and this contract and the Officers

195 and Employees of the city shall at all times and by all proper means facilitate the work to be performed hereunder.

The city shall perform all the obligations imposed upon it by this contract and the laws of the State of Oklahoma promptly and without unnecessary delay, particularly with reference to the levying and collection of the special assessments and payments of the proceeds thereof contemplated by this agreement and the laws of the state above mentioned.

The city agrees that on all cuts made in the said pavement that it will require before issuing a permit for any such cut, a deposit, with the City Engineer of a sum of money covering the repairing of such cuts. The contractor shall repair all cuts made on permits issued by the City Engineer within thirty (30) days after the receipt of a notice from the City Engineer notifying the contractor of the cuts, and the city shall pay to the contractor out of the sum deposited with the City Engineer when the permits are issued, at the prices above specified, for the actual amount of repairs made; said sums to be paid to the contractor when the work is completed and accepted by the City Engineer.

In Witness Whereof, the contractor R. F. Conway Company has caused these presents to be signed by its president and attested by its secretary, and the seal of the corporation to be affixed hereto, and the City of Oklahoma City has caused these presents to be signed by its Mayor and attested by its Clerk and the seal of the city to be affixed hereto, the day and year first above written.

R. F. CONWAY COMPANY,

By JNO. J. McCARTHY, *Secretary.*

THE CITY OF OKLAHOMA CITY,  
OKLAHOMA,

By MONT F. HIGHLEY,

*Pres. of the Council & Acting Mayor.*

HENRY M. SCALES, *Mayor.*

[SEAL.]

Attest:

GEO. HESS,

*City Clerk of City of Oklahoma City, Okla.*

*Construction Bond.*

Know All Men By These Presents, That we R. F. Conway Company, as principal, and Wm. Mee, O. G. Lee, and S. R. Raymond, as sureties, are held and firmly bound unto the City of Oklahoma

196 City, Oklahoma County, State of Oklahoma, in the penal sum of Thirty Seven Hundred Forty Nine (\$3749.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents.

The conditions of the above obligation are such that whereas, the said principal and the said city, under date of the 12 day of November, 1908, entered into a contract whereby, upon the consideration therein expressed, said R. F. Conway Company undertook, contracted and agreed to make certain improvements on Nineteenth Street from the East Line of Dewey Avenue to the East line of Western Avenue, in said City of Oklahoma City, Oklahoma, consisting of paving, curbing and other work incident thereto and set forth in said contract, and further promised and agreed to keep said city harmless against all lawful claims for damages to others arising from accidents occasioned by the doing of the work, or the conditions of the streets of said city while the said work is being done, and further promised and agreed to keep said city harmless against any and all claims for work done and material used in the making of said improvements; it being hereby intended to protect said city absolutely against all claims whatsoever arising out of the making of said improvements whether arising upon contract or otherwise.

Now, Therefore, If the said R. F. Conway Company will do and perform all the work and labor, and furnish all the material at its own cost and expense for the making of said improvements, and shall make the said improvements in the manner set forth in said contract and in accordance with the plans and specifications of the City Engineer of said city, and within the time fixed and prescribed by said contract, including the keeping the said city harmless from all claims of whatever nature, arising out of the making of said improvements, those for injury to persons or property, as well as for work, labor and material, then, and in that event the above obligation to be null and void; otherwise, to remain in full force and effect.

Witness our hands at Oklahoma City, State of Oklahoma, this 16th day of November, 1908.

R. F. CONWAY COMPANY,  
By JNO. J. McCARTHY, Sec'y.  
WM. MEE.  
O. G. LEE,  
S. R. RAYMOND.

197 STATE OF OKLAHOMA,  
*Oklahoma County, ss:*

Wm. Mee, O. G. Lee, and S. R. Raymond, sureties on the above obligation, being first duly sworn according to law, each for himself says: That he is worth the sum of Seven Thousand Four Hun-

dred Ninety Eight (\$7,498.00) Dollars over and above all of his debts, liabilities and exemptions.

WM. MEE.  
O. G. LEE.  
S. R. RAYMOND.

Subscribed and sworn to before me this 16th day of November, 1908.

[SEAL.]

WM. RAYMOND,  
*Notary Public.*

My commission expires April 20, 1911.

\* \* \* \* \*

(Here follows Contracts and Bonds of R. F. Conway Company which are omitted because they are identical in form with the contract and bond last above printed but which cover different streets and are for different prices.)

*Affidavit of Court Reporter to Testimony, etc.*

Thomas R. Clift, of lawful age being first duly sworn according to law deposes and states that he was the official court reporter for the United States Circuit Court for the Western District of Oklahoma, at the time of the hearing in the above entitled case in said court at Oklahoma City, before Hon. John H. Cotteral, on the application on behalf of Plaintiff for the temporary injunction and that as such stenographer and court reporter he took in shorthand notes the testimony and evidence introduced upon said hearing; that he has since transcribed the same and that the foregoing transcript of the testimony, evidence and exhibits, together with the Exhibits marked Nineteen to Thirty Nine inclusive, and making "Part 2" of this record, were all introduced in evidence upon the trial of said case, and that the same are a true, full, correct and complete copy of the evidence, testimony and exhibits, and that by reason of the inconvenience of binding exhibits marked nineteen to thirty nine into this record, same are separately bound and marked "Part 2" of the transcript of the case, and when added to this portion of the transcript, or "Part 1", said transcript is a true, full, correct and complete transcript and copy of all the testimony, evidence and exhibits introduced upon the trial of said case and contains a true, full, correct and complete transcript of the proceedings had upon the trial of said case.

Affiant further states that since taking the testimony in said case and reporting the same as set forth in this affidavit, he has retired from the office of Court Reporter for the United States Circuit Court for the Western District of Oklahoma, and therefore instead of attaching hereto his certificate, he makes this affidavit to the correctness of the same, and in addition to this affidavit herein certifies that the same is a true, full, correct, and complete transcript and copy

of said testimony and evidence, exhibits and proceedings as heretofore stated.

And Further affiant sayeth not.

THOMAS R. CLIFT.

Subscribed and sworn to before me this the 15th day of April, 1911.

[SEAL.]

LOUIS LOEFFLER,  
*Notary Public.*

My commission expires Dec. 21, 1914.

*Affidavit for Complainant.*

Affidavit of Foxhall P. McCormick as to Cost of Work and Profits Which Would Have Accrued.

Foxhall P. McCormick being first duly sworn according to law, deposes and says that he has been in the paving business constantly for twenty years, and has been in the asphalt business for fifteen years; that during a large part of said time he has been in the active management and control of paving contracts, and has done the calculating necessary in determining bids to be made, and has also been in control of the contracts that were let for work of this nature, and has also been familiar with the cost necessary to perform work of this kind. That during said time he has done general contracting with asphalt and other paving materials in Chicago, St. Louis, Kansas City, Topeka, Oklahoma City, Muskogee, San Antonio, Beaumont, and Fort Worth, Texas. That he has figured the cost of all the work represented by the bids made by David McCormick, the complainant in the above cause, to the city of Oklahoma City for the paving of certain street- and the doing of certain work in the city of Oklahoma City, as represented and shown by said bids; the advertisement for the work and improvements and of the estimate of the cost of doing such work; the cost of material and the total cost of completing the work and also figuring the difference  
199 between the costs of said work and the amount of said bid; and this affiant further states that after paying the total expenses of the work referred to by the several bids involved in this case, there would be a difference between the cost of completing said work pursuant to the plans and specifications and the amount of said bid of at least One Hundred Thousand (\$100,000) Dollars, and that the profits which have been earned by the complainant after performing all of the work and completing the improvement pursuant to and in conformity with the plans, specifications, advertisements, and bids and the acceptance of the same by the city would have been \$100,000.00.

And further affiant sayeth not.

FOXHALL P. McCORMICK.

Subscribed and sworn to before me this 16 day of Jan., 1911.

[SEAL.]

N. E. DE MOSS,  
*Notary Public.*

My commission expires Oct. 21, 1911.



*Affidavit of David McCormick as to Ability to Perform.*

David McCormick of lawful age being first duly sworn according to law deposes and states that at the time he filed his bid for the paving of the streets and the making of the improvements referred to in his bill in equity, the complainant in this case at the time the award was made by the City Council to him for the doing of the work and for the making of the improvements involved in this action, and at all times since the filing of his said bid, has been financially able to make the improvements involved in this action, and that he has at all times been willing to comply with the resolutions of said city and the terms of his bid and the award of said work and improvements and that he has at all times been ready, able and willing to make said improvements pursuant to the plans and specifications upon which said bid was made; and affiant further states that he is now and has at all times ever since the filing of his said bid for said improvements, been financially responsible and financially able to make said improvements under the terms and conditions prescribed by the City of Oklahoma City and under the terms and conditions provided by the City of Oklahoma City for the doing of said work and the making of said improvements.

And affiant further states that he would have made said improvements and completed the same but for the action of the Mayor and City Council and the other officers of said City of Oklahoma City, in failing to carry out their part of the contract with reference  
200 to said improvements with this affiant and but for their interference with him and his employees and those associated with him, in pretending to award a pretended contract for the making of said improvements to the R. F. Conway Company, and in failing to furnish him the necessary data, grade stakes, and other information which would enable him to complete the work.

And affiant further states that his failure to make said improvements was due entirely to the fault of the said City of Oklahoma City and its officers, agents and employees and not to any fault or neglect on the part of this affiant; that affiant was prevented from making said improvement by reason of the conduct of said City of Oklahoma City, its officers, agents, and employees and not by reason of any fault of this affiant.

Further affiant sayeth not.

DAVID McCORMICK.

Subscribed and sworn to before me the undersigned authority on this the 14 day of April, 1911.

[SEAL.]

N. E. DE MOSS,  
Notary Public.

My commission expires Oct. 21, 1911.

Transcript of Evidence, Part 1. Filed in the Circuit Court on April 19, 1911.

*Certificate of Court Reporter to Plan Profiles and Estimates Introduced by Complainant, etc.*

Thomas R. Clift of lawful age being first duly sworn according to law deposes and states that he was the official court reporter for the United States Circuit Court for the Western District of Oklahoma, at the time of the hearing in the above entitled case in said court at Oklahoma City before Hon. John H. Cotteral, on the application on behalf of Plaintiff for the Temporary Injunction and that as such stenographer and court reporter he took in shorthand notes the testimony and evidence introduced upon said hearing; that he has since transcribed the same and that the following exhibits herewith bound together marked "Exhibits Nineteen to Thirty Nine" inclusive were each and all introduced in evidence upon the trial of the said case, and that the same are a true, full, correct and complete copy of said Exhibits, and that by reason of the convenience in binding said exhibits with the other portion of said transcript the same are separately bound together herewith and are marked Part 2, of the transcript of the Case, and when added to Part 1, of said

Transcript said transcript is a true, full, correct and complete  
201 transcript and copy of all of the testimony, evidence, and exhibits introduced upon the trial of said case and contains a true, full, correct and complete transcript of the proceedings had upon said trial.

Affiant further states that since taking the testimony in said case and reporting the same as set forth in this affidavit, he has retired from the office of Court Reporter for the United States Circuit Court for the Western District of Oklahoma, and therefore instead of attaching hereto his certificate, he makes this affidavit to the correctness of the same, and in addition to this affidavit herein certifies that the same is a true, full, correct and complete transcript and copy of said testimony and evidence, exhibits and proceedings as heretofore set forth.

And further affiant sayeth not.

THOMAS R. CLIFT.

Subscribed and sworn to before me this the 15th day of April, 1911.

[SEAL.]

LOUIS LOEFFLER,  
Notary Public.

My Commission Expires Dec. 21, 1914.

Part 2 of Transcript of Evidence endorsed as follows: David McCormick vs. Oklahoma City, et al. No. 365. Part 2 of testimony taken by Thomas R. Clift being exhibits 19 to 39 inclusive. Filed April 19, 1911. Harry L. Finley, Clerk. By M. V. Haws, Deputy.

\* \* \* \* \*

(Here follow Exhibits 19 to 36 inclusive, being Maps or Profiles of the streets to be paved and which are covered by the contracts involved in this action, but the consideration of which would not aid in the determination of the matters involved herein.)

*Order — Cause Submitted April 19, 1911.*

Before Judge Cotteral.

Now on this 19th day of April, 1911, this cause comes regularly on for trial. The Plaintiff is present by his attorney, B. F. Burwell, and the defendants are present by their attorney G. A. Paul.

Thereupon, on agreement of counsel in open court and in accordance with the stipulation of parties on file and of record 202 herein, it is ordered that this cause be submitted on the pleadings, record, affidavits and other evidence taken upon the hearing for Temporary Injunction herein.

*Decree.*

Now on this 7th day of June, 1911, the above cause came on for hearing before me at a regular term of the Circuit Court of the United States for the Western District of the State of Oklahoma, sitting at Enid, Oklahoma. The plaintiff being represented by its solicitors, Burwell, Crockett & Johnson and the defendants being represented by their solicitors, Flynn, Ames & Chambers, W. R. Taylor and G. A. Paul.

And thereupon, upon consideration of the pleadings, evidence, exhibits and other proof in said cause which said evidence, proof and exhibits have by the order of this court been incorporated in the record herein;

It was considered, ordered and decreed that the bill of complaint be and the same is hereby dismissed at the cost of the complainant.

Second, that the defendants recover of the complainant the costs of this action to be taxed by the Clerk.

To which decree the plaintiff in open court excepted which exception is by the court allowed.

JOHN H. COTTERAL, *Judge.*

Filed in the Circuit Court on June 7, 1911.

*Order Making Evidence, etc., a Part of the Record.*

Now on this 15 day of June, 1911, it is by the court ordered that all of the evidence in this cause, including the exhibits to the bill, the affidavits on file and used on the application for a temporary injunction and which by stipulation were considered as evidence in this cause at the final hearing, the oral evidence taken in said cause, and which was reduced to writing and filed herein and all other evidence and exhibits used at said final hearing, and which are on file herein, are ordered to be incorporated in the record and made a part thereof.

JOHN H. COTTERAL, *Judge.*

Filed in the Circuit Court on June 15, 1911.

*Assignment of Errors.*

To the Honorable John H. Cotteral, District Judge for the Western District of the State of Oklahoma:

203 And on this 25 day of July, 1911, comes the plaintiff by its solicitors and says that the decree entered in the above cause on the 7th day of June, 1911, is erroneous and unjust to the plaintiff.

First. Because the Court committed error in dismissing the plaintiff's bill upon the evidence in pleading.

Second. Because the Court committed error in holding that on the evidence in this cause taken in connection with the allegations of the bill and the answer did not prove a contract between the plaintiff and the defendant, The City of Oklahoma City and its Officers, for the construction of pavement and improvements set out in the bill.

Third. Because the court erred in holding on the evidence and the allegations of the bill and the answer, that the contract set out in the bill of complaint between the plaintiff and the City of Oklahoma City and its Officers, was not a complete contract and that in order to construct a contract between the plaintiff and defendants which would be binding upon the City, it was necessary in addition to the resolutions and ordinances of the City, notices and acts of the parties that a formal written contract should be executed by the resolution parties.

Fourth. Because the court erred in holding that under the pleadings, and evidence in this case that the defendants were not estopped from denying the execution of the contract with the plaintiff for laying the paving set out in the contract in the bill, and that under the evidence in this case that the defendants could repudiate the contract and decline to execute the formal written contract as evidence by the resolutions, published notices, bids and acts of the City Council of the construction of the improvements set out in the bill to the plaintiff.

Fifth. Because the court erred in holding that under the evidence and pleadings in this case that in equity the defendants would be allowed to take advantage of the non-execution of the formal written contract by them; the same being intended only to embrace the matters and things set out in full in writing, in the ordinances, resolutions, published notices, bids and awards in evidence on this case and as set forth in plaintiff's bill.

Sixth. Because the court erred in holding that under the evidence in this case showing that after the defendant, City, had made awards to the plaintiff and entered into a contract with him and constructed the improvement, set out in the bill, and the said City after having entered into such contract having rendered it impossible as shown by the evidence in this case for the plaintiff to perform his part of the contracts by making a pretended award for the construction of the improvements to the Conway Paving

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Company to construct said improvements, that the court erred in holding that the plaintiff was not entitled to the equitable relief prayed by him in his bill and refusing in this action to assess such damages as the plaintiff has suffered by reason of the wrongful acts of the said City of Oklahoma City and its Officers and the defendants in this case in refusing to permit the plaintiff to perform said contract awarded to him as shown by the evidence.

Seventh. Because the court erred in holding under the evidence in this case that the plaintiff was not entitled to the relief asked for and in dismissing his bill.

Eighth. Because the court erred in holding that on the evidence and pleadings of this case that the Mayor and City Council of the City of Oklahoma City had power to vacate the awards made to the plaintiff for constructing the improvements, set out in the bill, at any time after the awards were made.

Ninth. Because the court erred in holding on the evidence and pleadings in this case that the Mayor and City Council of the City of Oklahoma City were not bound until the execution of a final contract or contracts embodying a complete statement of the matters and things theretofore agreed to by the resolutions, published notices, bids and awards theretofore made and of record in the records of said municipal corporation, and in holding that the entire matters were inchoate and not final until such formal writing was duly subscribed by the parties.

Wherefore, the plaintiff prays that the said decree be reversed and that the Circuit Court be directed to enter such decree as is prayed for by said bill.

BURWELL, CROCKETT & JOHNSON,  
DEVEREUX & HILDRETH,  
*Solicitors for the Plaintiff.*

Filed in the Circuit Court on July 25, 1911.

*Petition for and Order Allowing Appeal.*

To the Hon. John H. Cotteral, District Judge for the Western District of the State of Oklahoma:

The above named plaintiff, feeling himself aggrieved by the decree made and entered in this cause on the 7th day of June, A. D. 1911, does hereby appeal from said decree to the Circuit Court of

205 Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that a citation issued as provided by law, and that a transcript of the records, proceedings and papers upon which said decree was based, duly authenticated may be sent to the United States Circuit Court of Appeals sitting at St. Louis.

And your petitioner further prays that the proper order be made to effect its appeal.

BURWELL, CROCKETT & JOHNSON,  
DEVEREUX & HILDRETH,  
*Solicitors for the Plaintiff.*

Petition granted and appeal is allowed.

The bond on appeal is fixed at \$500.00 conditioned as required by law.

July 25", 1911.

JOHN H. COTTERAL, *Judge.*

Filed in the Circuit Court on July 25, 1911.

*Bond on Appeal.*

Know All Men By These Presents, That we, David McCormick and Southern Surety Co. of Muskogee, Oklahoma, are held and firmly bound unto the City of Oklahoma City, a municipal corporation, Henry M. Scales, Mayor of said City, George Hess, Clerk of said City, W. C. Burke, City Engineer of said City, Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers and R. T. Helm, constituting the Councilmen of said City, in the full and just sum of Five Hundred Dollars, to be paid to the said City of Oklahoma City, a municipal corporation, Henry M. Scales, Mayor of said City, George Hess, Clerk of said City, W. C. Burke, City Engineer of said City, Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers and R. T. Helm, constituting the Councilmen of said City, their heirs, executors, administrators, successors or assigns, to [whi-h] payment well and true to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 2nd day of August, in the year of our Lord one thousand nine hundred and eleven.

206 Whereas, lately at the June term of the Circuit Court of the United States, sitting at Enid in a suit depending in said Court between David McCormick, plaintiff, and the City of Oklahoma City, a municipal corporation, Henry M. Scales, Mayor of said City, George Hess, Clerk of said City, W. C. Burke, City Engineer of said City, Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers and R. T. Helm, constituting the Councilmen of said City, defendants a decree was rendered against the said plaintiff, and the said plaintiff has obtained an appeal from the said court to reverse the decree in the aforesaid suit, and a citation directed to the said defendants, above named, citing and admonishing them to appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said David McCormick shall prosecute said appeal to effect, and answer all damages and costs if he fails to make good his plea, then

the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

[SEAL.] DAVID McCORMICK,  
By BURWELL, CROCKETT & JOHNSON,  
*His Attorneys.*

[SEAL.] SOUTHERN SURETY COMPANY,  
By M. A. KELLEY,  
*Its Attorney in Fact.*

Sealed and delivered in the presence of

N. E. DE MOSS

Approved by

JOHN H. COTTERAL, *Judge.*

Filed in the Circuit Court on Aug. 7, 1911.

*Election to Have Record Printed in Circuit Court of Appeals and Designation as to Printing.*

Comes now the appellant in the above entitled cause and gives notice of his election to take and file the transcript of the record herein in the appellate court to be printed under the supervision of its clerk and under its rules; and the said appellant hereby designates all of that portion of the record in said cause to be included in said transcript to be printed as follows, to-wit:

All the pleadings:

- 207 (a) Plaintiff's Bill with Exhibits.  
(b) Amendment to Original Bill.

(c) Answer.

(d) Replication.

Restraining order of February 18, 1909, Filed February 20, 1909.  
Stipulation dated June 24, 1909, filed July 17, 1909.

Motion of R. F. Conway Company to be made party, filed February 24, 1909.

Motion to modify the restraining order, service accepted February 20, 1909, and filed February 20, 1909.

Petition for Appeal and Order, endorsed filed July 25, 1911.

Citation, Original filed July 25, 1911, dated July 25, '11.

Assignment of Errors, filed July 25, 1911.

Final decree, dated June 7, 1911, filed June 7, 1911.

Order Incorporating of evidence in record dated June 15 1911, filed June 15, 1911.

Memorandum Opinion on Temporary Injunction dated March 8, 1909, filed March 8, 1909.



*Evidence.*

All of the oral testimony taken down and incorporated in the evidence.

All of the proceedings of the Mayor and City Council including all published notices.

All affidavits introduced in evidence.

Exhibit A. Being paving Resolution No. 1, approved and adopted Sept. 21, 1908.

Paving Resolution No. 2 approved Sept. 21, 1908.

Paving Resolution No. 4 approved Sept. 21, 1908.

Exhibit B. Resolution of City Council passed October 19, 1908, approved Oct. 19, 1908.

Exhibit D. Notice to Paving Contractors published from October 21, to October 31, 1908, signed by George Hess, City Clerk.

Exhibit E. Notice to paving Contractors published October 21, to 31, 1908 signed by George Hess, City Clerk.

Forms of proposal of David McCormick for paving various streets being eighteen in number dated November 2nd, 1908, and signed David McCormick, Contractor.

Contract dated November 8, 1908, between David McCormick and the City of Oklahoma City for paving Nineteenth Street from the East Line of Dewey Avenue to the East line of Western Avenue. (Note—There are eighteen of these contracts, similar except as to street. We only ask one to be printed.)

Affidavit of Foxhall McCormick, sworn to January 16, 1911.

Affidavit of David McCormick, sworn to April 14, '11.

Dated this the 12th day of August, 1911.

JOHN DEVEREUX, AND

BURWELL, CROCKETT & JOHNSON,

*Attorneys for Appellant.*

We hereby accept service of the above notice this the 12th day of August, 1911, and acknowledge receipt of a true, full, correct and complete copy thereof.

FLYNN, AMES & CHAMBERS,

J. W. JOHNSON AND GEO. A. MATLOCK,

*Att'ys for Oklahoma City, Appellee.*

Filed in the Circuit Court on August 14, 1911.

*Notice of Election to Have Entire Record Sent to Circuit Court of Appeals.*

Comes now the appellant in the above entitled cause and gives notice to the appellees that he elects to [be] send to the Circuit Court of Appeals the entire record and transcript in the above

entitled cause, but that he will only print that portion designated in the notice served August 12th, 1911.

Respectfully,

DEVEREUX & HILDRETH,  
BURWELL, CROCKETT & JOHNSON,  
*Solicitors for the Appellant.*

Service accepted of this notice and receipt of copy acknowledged this 15th day of August, 1911.

FLYNN, AMES & CHAMBERS,  
*Solicitors for Defendants.*

J. W. JOHNSON,  
*Solicitor for Defendant, Oklahoma City.*

Filed in the Circuit Court on Aug. 19, 1911.

*Order Extending Time to File Record in Circuit Court of Appeals.*

For satisfactory reasons appearing to the Court the time for filing the record in this cause in the Circuit Court of Appeals pursuant to the appeal sued out is extended until the 25th day of October, 1911.

209 September 18th, 1911.

JOHN H. COTTERAL, *Judge.*

Filed in the Circuit Court on Sept. 18, 1911.

*Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA,  
*Western District of Oklahoma, ss:*

I, Harry L. Finley, Clerk of the Circuit Court of the United States of America, for the Western District of Oklahoma, do hereby certify the foregoing to be a full, true and complete transcript of the pleadings, record and proceedings in said court in case No. 365, in equity, wherein David McCormick, a resident of the City of St. Louis and of the State of Missouri, is complainant, and The City of Oklahoma City, a corporation, duly organized and incorporated under the laws of the State of Oklahoma, Henry M. Scales, as Mayor of the City of Oklahoma City, Geo. Hess, as clerk of the City of Oklahoma City, W. C. Burke, City Engineer of the City of Oklahoma City, Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers, and R. F. Helm, as councilmen, within and for the City of Oklahoma City, each and all of whom are residents and citizens of the Western Judicial District of the State of Oklahoma, are defendants; as full, true and complete as the said transcript purports to contain, and as called for by the designation for transcript of the record above set forth.

I further certify that the original citation is hereto attached and returned herewith.

In testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Guthrie, in said District this 23rd. day of October, A. D., 1911.

[Seal U. S. Circuit Court Western District Oklahoma.]

<sup>s</sup>  
HARRY L. FINLEY,  
*Clerk of the Circuit Court of the United States  
for the Western District of Oklahoma.*

Filed Oct. 25, 1911. John D. Jordan, Clerk.

210                   *(Appearance of Counsel for Appellant.)*

On the thirtieth day of October, A. D. 1911, the appearance of Counsel for Appellant was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3690.

DAVID McCORMICK, Appellant,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation, et al.

The Clerk will enter *my* appearance as Counsel for the Appellant.

B. F. BURWELL,  
A. P. CROCKETT,  
CHAS. E. JOHNSON,  
*Oklahoma City, Okla.*  
JOHN DEVEREUX,  
*Guthrie, Okla*

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit, No. 3690. David McCormick, Appellant, vs. City of Oklahoma City, a municipal corporation, et al. Appearance. Filed Oct. 30, 1911. John D. Jordan, Clerk. B. F. Burwell, A. P. Crockett, Charles E. Johnson, John Devereux, Counsel for Appellant.

*(Appearance of Mr. J. W. Johnson as Counsel for Appellees, Except R. F. Conway Co.)*

And on the twenty-ninth day of November, A. D. 1911, the appearance of Mr. J. W. Johnson as Counsel for Appellees, except F. F. Conway Co. was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3690.

DAVID McCORMICK, Appellant,  
vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, et al.

211 The Clerk will enter my appearance as Counsel for the Appellees except R. F. Conway Company.

J. W. JOHNSON.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3690. David McCormick, Appellant, vs. The City of Oklahoma City, a municipal corporation, et al. Appearance. Filed Nov. 29, 1911. John D. Jordan, Clerk. J. W. Johnson, Counsel for Appellees, except R. F. Conway Co.

*(Appearance of Mr. G. A. Paul as Counsel for the Appellees.)*

And on the fourteenth day of March, A. D. 1912, the appearance of Mr. G. A. Paul as Counsel for the appellees was filed in said cause, in the words and figures following to wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3690.

DAVID McCORMICK, Appellant,  
vs.

THE CITY OF OKLAHOMA CITY et al.

The Clerk will enter my appearance as Counsel for the Appellees.  
G. A. PAUL.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3690. David McCormick, Appellant, vs. The City of Oklahoma City, et al. Appearance Filed March 14, 1912, John D. Jordan, Clerk. G. A. Paul, Counsel for Appellees.

*(Order of Submission.)*

And on the fourteenth day of May, A. D. 1912, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term,  
1912.

Tuesday, May 14, 1912.

No. 3690.

DAVID McCORMICK, Appellant,  
vs.  
THE CITY OF OKLAHOMA CITY et al.

212 Appeal from the Circuit Court of the United States for the  
Western District of Oklahoma.

This cause having been called for hearing in its regular order, argument was commenced by Mr. B. F. Burwell for Appellant, continued by Mr. J. W. Johnson for Appellees and concluded by Mr. B. F. Burwell for Appellant.

Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

*(Opinion.)*

And on the twenty-second day of February, A. D. 1913, the opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in said cause, in the words and figures following, to wit:

213 United States Circuit Court of Appeals, Eighth Circuit,  
December Term, A. D. 1912.

No. 3690.

DAVID McCORMICK, Appellant,  
vs.  
THE CITY OF OKLAHOMA CITY et al.

Appeal from the Circuit Court of the United States for the Western  
District of Oklahoma.

Mr. B. F. Burwell (Mr. John Devereux and Messrs. Burwell, Crockett & Johnson were with him on the brief), for appellant.

Mr. J. W. Johnson (Mr. George A. Matlack and Mr. G. A. Paul were with him on the brief), for appellees.

Before Adams and Smith, Circuit Judges, and Willard, District Judge.

SMITH, *Circuit Judge*, delivered the opinion of the court:

The City of Oklahoma City is and has been, since a time prior to the happening of the matters complained of, a municipal corporation in the State of Oklahoma and as such has had under certain conditions authority to pave and improve its streets and alleys including intersections at the cost of the adjacent property owners. The law provided for a resolution in such cases by the City Council to proceed with the improvements containing such matter as would enable the engineer to prepare the necessary plans and specifications and continued:

"Said resolution shall set forth any such reasonable terms and conditions as the mayor and council shall deem proper to impose with reference to the letting of the contract and the provisions thereof, and the mayor and council shall, by said resolution, provide that the contractor shall execute to the city a good and sufficient bond, in an amount to be stated in such resolution, conditioned for the full and faithful execution of the work and performance of the contract and for the protection of the city and all property owners interested against any loss or damage by reason of the negligence or improper execution of the work, and may require a bond in an amount to be stated in such resolution for the maintenance in good condition of such improvement for a period of not less than five years from the time of its completion, or both, in the discretion of the mayor and council.

"Said resolution shall also direct the City Clerk to advertise for sealed proposals for furnishing the materials and performing the work necessary in making such improvement. \* \* \* At the time and place specified in such notice, the mayor and council shall examine all bids received, and without unnecessary delay award the contract to the lowest and best bidder." Section 725, Snyder's Compiled Laws of Oklahoma.

The law also provided for an appraisal and apportionment of the benefits and the assessment of the adjacent property therewith payable in ten annual installments and for the issuance of improvement bonds to be paid from such assessments; that they should be sold at not less than par and "which bond or bonds shall in no event become a liability of the city issuing the same." Section 726, Snyder's Compiled Laws of Oklahoma.

October 19, 1908, the mayor and city council adopted a resolution substantially as provided by law providing for the improvement of eighteen of its streets and in said resolution was the following:

"It is further resolved that all the work done and material furnished shall be in strict conformity to the plans and specifications of the city engineer therefor and of the proper quality and tests. That the contractor to whom a contract shall be awarded for the construction of such improvements shall execute to the city a good and sufficient bond in a sum equal to 20% of the contract price

conditioned for the faithful performance of the work and the execution of the contract and for the protection of the said city and all property owners against any and all loss or damage by reason of neglect or improper execution of the work and the said contractor shall also execute good and sufficient bond in a sum of 10% of the contract price conditioned for the maintenance of such work in a *street* of good repair for a period of not less than five years from the date of the completion and acceptance of such work.

"Be it further resolved that the city clerk of said city be and he is hereby authorized and directed to advertise for sealed bids for furnishing the materials and performing the work necessary to and for the improvement of such streets in the manner required by law, each bid to be accompanied by certified check in the sum of 3% of the amount of the bid, to be forfeited to the city in case the successful bidder fails to enter into the contract and give the required bond within the required time."

The specifications thus referred to contained the following:

"All bids for work to be performed under this contract shall be accompanied by a certified check for 3% of Bid — Dollars  
215 (\$—), and in case of failure on the part of the successful bidder to enter into contract within twenty (20) days after notice of acceptance of such bid, said check to become the property of the City of Oklahoma City, as liquidated damages for failure to enter into such contract. Upon execution of said contract within said twenty (20) days, said check to be returned to the bidder furnishing it."

October 21 to 31, 1908, the city clerk advertised for bids on this work. In his advertisement was the following:

"Each bid must be accompanied by certified check in the sum of three per cent (3 per cent) of the amount bid, to be forfeited to the city in case the successful bidder fails to enter into a contract and give the required bond within the required time. Contractor will be required to give bond in the sum of twenty per cent (20 per cent) of the contract price, for the faithful performance of said work and the holding of the city harmless from any and all damages which might occur. Bids will be received from both a five (5) year and ten (10) year guarantee. Also the contractor will be required to give a bond in the sum of ten per cent (10 per cent) of the contract price as a guarantee of keeping the pavement in a state of good repair for a period of five (5) years if bids are accepted on a five (5) year guarantee, and in a state of good repair for a period of ten (10) years if bids are accepted on a ten (10) year guarantee. The contractor shall receive for the above work Street Improvement Bonds at par value against the abutting property according to House Bill No. 231, Approved April 17, 1908.

"No proposals will be considered on any street which does not contain a bid upon every item included in the estimate of the City Engineer for such street.

"Council reserves the right to reject any or all bids."

In response to these advertisements Mr. David McCormick, the R. F. Conway Co., and others made bids. Both McCormick and



the Conway Co., bid on a five and ten year guarantee. On November 2, 1908, the bids were opened by the city council. McCormick was the lowest bidder on a ten year guarantee and the R. F. Conway Co., was the lowest bidder on a five year guarantee. At a meeting on November 4th the council by a unanimous vote rejected all bids on a five year guarantee. The council then decided to take up the bids street by street and that contracts be awarded the lowest and best bidder and adjourned to two-thirty P. M. A motion was then made to reconsider the action in the forenoon to take up the bids street by street and that contract be awarded to the lowest and best bidder and this motion was lost. Thereupon the bids were taken up street by street and as to each substantially the following appears:

"Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried."

216 Thereupon—

"Moved by Mr. Helm, seconded by Mr. Workman, that the action of the council in awarding contracts for asphalt paving at this meeting be rescinded. Motion lost."

On November 9, 1908, the following proceedings are recorded:

"Moved by Mr. Highley, seconded by Mr. Helm, that the council reconsider the action taken at meeting held November 4, 1908, 'in rejecting all bids for asphalt pavement based on five year guarantee.' Motion carried."

"Moved by Mr. Highley, seconded by Mr. Corder, that the council reconsider the action taken at the meeting held November 4, 1908, in awarding contracts for all asphalt paving."

The council adjourned to November 10th and then to the 11th when the city attorney reported that in his opinion, "any time before the contracts are signed up by the city and the contractor that the council had the right to rescind its action in awarding said contracts."

Judge Burwell appeared before the council and spoke against the motion and Judge Harris spoke in favor of the same. Thereupon the motion to rescind the action taken at the meeting held November 4, 1908, in awarding contracts for all asphalt paving, carried by a vote of six to four. Later Judge Burwell presented eighteen contracts of David McCormick for paving the streets formerly awarded him and demanded that they be accepted by the council. Thereupon the council took up the bids under the five year guarantee and finding that in the aggregate the bids of the R. F. Conway Co., were some eleven thousand dollars below those of David McCormick awarded contracts to it. The R. F. Conway Co. presented its bonds and contracts and the council ordered they be approved and accepted.

The city had a form of printed and written contract which was used both by the plaintiff and the R. F. Conway Co., in the preparation of their thirty-six contracts.

These contracts contained numerous provisions not in the ad-

vertisements, plans and specifications, the bids and their acceptance. These contracts all contained the following provision:

"This contract is entered into subject to the approval or rejection of the council of the City of Oklahoma City, and it shall not bind either party until so approved and confirmed and is subject to all city ordinances now in force relating to such matters."

The plaintiff is president of the Parker-Washington Company and as such had made similar contracts with the same city to an amount exceeding two hundred and fifty thousand dollars. If he knew that such contracts would be expected he agreed thereto prior to tendering the eighteen contracts in question. If he did not under-

stand that by his bid he was agreeing to such contracts as he knew from past experience the city would demand then there was no meeting of the minds of the parties. If he did so understand he knew that the contract contained the provision that "it shall not bind either party until so approved and confirmed."

On November 16th Mr. McCormick brought suit in the State District Court for Oklahoma County against the mayor of Oklahoma City and others and obtained a temporary restraining order. The R. F. Conway Co. were upon leave of Court made defendants. December 4th a demurrer was sustained to the petition and on December 5th plaintiff was granted twenty days to file amended petition and on December 23rd fifteen days additional were granted him and on January 25, 1909, ten days additional were granted to file an amended petition. On the same day the action was dismissed but on January 27th it was reinstated and the suit was still pending after this suit was brought.

The bill sets up the facts, alleges the contract was completed between the plaintiff and the city and prays a decree of specific performance of its alleged contract, a temporary and possibly a permanent injunction, and for general equitable relief.

The defendants in answer allege that all that took place between the plaintiff and parties defendant constituted only preliminary negotiations and deny there was ever any completed contract.

Upon full hearing the Court dismissed the proceedings and David McCormick appeals.

Since the filing of the bill the contracts have all been completely performed by the R. F. Conway Co., and of course a decree for specific performance is now out of the question and an injunction is likewise impossible.

Mr. McCormick insists that notwithstanding this fact if the court should now find in his favor it could assess his damages under the prayer for general equitable relief. *Omaha Horse Railroad Co. v. Cable Tramway Co.*, 32 Fed. 727; *Milkman v. Ordway*, 106 Mass. 232; *Woodbury v. Marblehead Water Co.*, 15 N. E. (Mass.) 282; *Van Allen v. N. Y. Elevated Railroad Co.*, 38 N. E. (N. Y.) 997; *Holland v. Anderson*, 38 Mo. 55, 58; *Lewis, et al. v. Town of North Kingston*, 11 Atl. (R. I.) 173. It thus becomes important to determine whether the plaintiff had a valid and completed contract or not.

It appears that the city had by its specifications, advertisement

for bids, and contracts prepared for such cases, provided expressly for a written contract. The question here is not, therefore, whether in the absence of these requirements there would have been a contract or the right to maintain an action of mandamus but was the city bound the moment it voted to award the contract to Mc-

218 McCormick or was it necessary in the absence of a waiver to give him notice of the award and to prepare and sign a written contract?

Appellant has argued at length upon the distinction between the governmental or public functions of a city and its property and business powers.

This distinction was pointed out with care by this Court in *Illinois Trust & Savings Bank v. The City of Arkansas City*, 76 Fed. 271, and it will be conceded for the purposes of this case that in awarding these contracts the City of Oklahoma City was acting in the exercise of its business powers.

It is not important to consider the numerous authorities cited that ordinarily the award at least with notice would have concluded a contract with Mr. McCormick. Neither is it important to determine whether he had the right to a writ of mandamus or other writ to compel execution of a contract if suit were promptly brought.

The question is whether the plaintiff had such a contract as that an action for specific performance or an injunction would lie in view of the fact that the specifications, advertisement for bids and contract prepared and regularly used by the city expressly contemplated a formal written contract.

Judge Dillon says:

"After the opening of the bids, the ascertainment of the lowest or most favorable bidder, and the adoption of a resolution that the contract be awarded to him, does not make a completed contract between the municipality and the bidder when the charter requires that all contracts relating to city affairs shall be in writing, or when the advertisement so specifies." *Dillon on Municipal Corporations*, 5th Ed. 810.

And it is stated in the *American and English Encyclopedia of Law*:

"Where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon." 7 *Am. & Eng. Enc. of Law*, 2nd Ed. 140.

"A vote accepting a bid is not a contract where a provision is distinctly made for the future execution of a formal contract." 20 *Am. & Eng. Enc. of Law*, 2nd Ed. 1170.

And in *Cyc.* it is said:

"Where parties are merely negotiating as to the terms of an agreement to be entered into between them, there is no meeting of minds while such agreement is incomplete. Thus where they intend that their verbal negotiations shall be reduced to writing as the evidence of the terms of their agreement, there is nothing binding on them until the writing is executed." 9 *Cyc.* 280.

219 These authorities are sustained by *Jersey City Water Commissioners v. Brown*, 32 N. J. Law, 504; *State v. Noyes*, 25 Nev. 31, 56 Pac. 946; *Eads v. Carondelet*, 42 Mo. 113; *Starkey v. Minneapolis*, 19 Minn. 203 (166); *Mississippi and Dominion Steamship Co. v. Swift*, 29 Atl. (Me.) 1063; *Hodges v. Sublett*, 91 Ala. 588, 8 So. 800; *Congdon v. Darcy*, 46 Vt. 478; *Mann v. Rochester*, 29 Ind. App. 12, 63 N. E. 874; *Edge Moor Bridge Works v. Inhabitants of Bristol County*, 170 Mass. 528, 49 N. E. 918; *Dunham v. Boston*, 12 Allen (Mass.) 375; *Hamilton v. Chopard*, 9 Wash. 352, 37 Pac. 472; *State, ex rel., Cleveland Trinidad Paving Co. v. Board of Public Service of Columbus*, 90 N. E. 389. In the last case where there was no notification by the council to the bidder it was held that it did not constitute an agreement.

Of course the distinction must be borne in mind between the enforcement of an executory and an executed contract.

If with the acquiescence of the defendant the plaintiff had gone on without a written contract and executed the contract they were negotiating upon and the city had received the benefits it is probable it could not have defeated him in an action to recover the bonds.

The rule undoubtedly is that if the parties have completed their negotiations and reached an entire basis of agreement and one party with the knowledge and acquiescence of the other has gone on and performed the contract in whole or in part without the formal reduction of the contract to writing the other party will be held to have waived the execution of the written contract. *Argenti v. San Francisco*, 16 Cal. 256, *Fort Madison v. Moore*, 109 Iowa 476, 80 N. W. 527; *Beckwith v. City of New York*, 106 N. Y. Supp. 175. And especially is this true where a property owner is resisting an assessment under such proceedings. *Ross v. Stackhouse*, 16 N. E. (Ind.) 501. We shall therefore assume that where parties have fully agreed upon a contract but have simply decided to reduce it to writing as evidence the contract may be enforced especially where it has been executed in whole or in part by the party seeking its enforcement with the knowledge and acquiescence of the other party notwithstanding the failure to reduce it to writing. But if the parties have stipulated in effect that the contract shall only be in force from the time it is reduced to writing and executed there is no completed contract until it is put in writing as agreed.

It is claimed that Mr. McCormick was present at the meeting of November 4, 1908, and knew of the action of the council in awarding him the contracts.

This Court is in grave doubt whether the mere presence of an interested party during the public deliberations of such a legislative body as the city council would serve to make an award binding upon the city until it saw fit to notify him that it had accepted the proposition but it is not necessary to pass upon this question as the Court is of the opinion that the City of Oklahoma City having expressly provided by its specifications and advertisement that the

220 contract must be reduced to writing and Mr. McCormick having known from past experience what would be expected in the way of a written contract the city was not bound in the

absence of the execution of such a contract to proceed further with the plaintiff and the decree of the Circuit Court in dismissing his bill was correct.

It is therefore ordered and adjudged that it be  
Affirmed.

Filed February 22, 1913.

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*(Decree.)*

And on the twenty-second day of February, A. D. 1913, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1912.

SATURDAY, February 22, 1913.

No. 3690.

DAVID McCORMICK, Appellant,  
vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation; HENRY M. Scales, Mayor of said City; George Hess, Clerk of said City; W. C. Burke, City Engineer of said City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers, and R. T. Helm, Constituting the Councilmen of said City.

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that the City of Oklahoma City, a municipal corporation, Henry M. Scales, Mayor of said City, George Hess, Clerk of said City, W. C. Burke, City Engineer of said City, Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers and R. T. Helm, constituting the Councilmen of said City, have and recover against David McCormick the sum of twenty dollars for their costs herein and have execution therefor.

February 22, 1913.

222

*(Petition for Appeal to Supreme Court U. S.)*

And on the eleventh day of April, A. D. 1913, a petition for appeal to the Supreme Court, U. S. was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

#—.

DAVID McCORMICK, Citizen and Resident of the City of St. Louis,  
State of Missouri, Complainant,

vs.

CITY OF OKLAHOMA CITY, a Corporation Duly Organized and Incorporated under the Laws of the State of Oklahoma; Henry M. Scales, as Mayor of the City of Oklahoma City; George Hess, as Clerk of the City of Oklahoma City; W. C. Burke, as City Engineer of the City of Oklahoma City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers, and R. F. Helm, as Councilmen within and for the City of Oklahoma City, Each of Whom Are Residents and Citizens of the Western Judicial District of the State of Oklahoma, Defendants.

*Petition for Appeal.*

The above named appellant, David McCormick, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a judgment has therein been rendered on the 22nd day of February, A. D. 1913, affirming the decree of the Circuit Court of the United States for the Western District of Oklahoma, and that the matter in controversy in said suit exceeds the amount of Forty Thousand Dollars (\$40,000), besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Eighth Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

223 Wherefore, the said appellant prays that an appeal be allowed him in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignments of error herewith filed by said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

JOHN DEVEREUX,  
B. F. BURWELL,  
*Attorneys for Appellant.*

(Endorsed:) No. 3690. In the U. S. Circuit Court of Appeals for the Eighth Circuit. David McCormick, Appellant, vs. City of Oklahoma City, et al. Petition for Appeal to Supreme Court, U. S. Filed Apr. 11, 1913, John D. Jordan, Clerk. Burwell, Crockett & Johnson, Oklahoma City, Okla., Attorneys for Appellant.

*(Assignment of Errors on Appeal to Supreme Court U. S.)*

And on the eleventh day of April, A. D. 1913, an Assignment of Errors on Appeal to the Supreme Court, U. S., was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

#—.

DAVID MCCORMICK, Citizen and Resident of the City of St. Louis,  
State of Missouri, Complainant,

vs.

CITY OF OKLAHOMA CITY, a Corporation Duly Organized and Incorporated under the Laws of the State of Oklahoma; Henry M. Scales, as Mayor of the City of Oklahoma City; George Hess, as Clerk of the City of Oklahoma City; W. C. Burke, as City Engineer of the City of Oklahoma City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers, and R. F. Helm, as Councilmen within and for the City of Oklahoma City, Each of Whom Are Residents and Citizens of the Western Judicial District of the State of Oklahoma, Defendants.

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*Assignments of Error.*

The appellant in the above entitled cause, in connection with his petition for appeal herein, presents and files therewith his assignments of error, as to which matters and things he says that the decree entered herein on the 22nd day of February, 1913, is erroneous, to-wit:

First. Because the court committed error in dismissing plaintiff's appeal upon the evidence and pleadings.

Second. Because the court committed error in holding that all the evidence in this cause, taken in connection with the allegations of the bill and of the answer, did not prove a contract between the plaintiff and defendant, City of Oklahoma City, and its officers, for the construction of the pavement and improvements set out in the bill.

Third. Because the court erred in holding on the evidence and allegations of the bill and answer that the contracts set out in the bill of complaint between plaintiff and the City of Oklahoma City, and its officers, were not completed and binding contracts, and further, in holding that in order to make a contract between the plaintiff and defendants which would be binding upon the City of



Oklahoma City, it was necessary, in addition to the resolutions and ordinances of the City, notices and acts of the parties, plans, profiles and specifications, which were introduced in evidence, and bids and awards, that a formal written contract should be executed by the parties.

Fourth. Because the court erred in holding that under the pleadings and evidence in this case the defendants were not estopped from denying the validity of the awards made to the plaintiff for laying the pavement and improvements set out in the bill of complaint, and in holding that under the evidence in this case that the defendants could repudiate the contracts, and decline to execute the formal written contracts, as evidenced by the resolutions, published notices, bids, plans, profiles, specifications, notices and awards, and acts of the City Council, for the construction of the improvements set out in the bill of complaint.

Fifth. Because the court erred in holding that under the evidence and pleadings in this case that in equity the defendants would be allowed to take advantage of the nonexistence of the formal  
225 written contracts by them; the same being intended only to embrace the matters and things set out in full in the writings, ordinances, resolutions, published notices, bids, and awards, plans, profiles, and specifications in evidence in this case, and as set forth in the complainant's bill of complaint.

Sixth. Because the court erred in not holding that under the evidence in this case, by which it appeared that the defendant City, and defendants, had prevented this complainant from carrying out and performing the construction of the pavement and improvements set out in the bill, that the complainant was entitled to introduce evidence as to the measure of his damages by such wrongful acts of the defendants, and in not assessing such damages as evidenced that the complainant had suffered by reason of such wrongful acts of the defendants in preventing the complainant from carrying out and performing his contracts.

Eighth. Because the court erred in holding that there was not a completed contract between the plaintiff and defendants at the time the awards were made by the City Council of the City of Oklahoma City, on the bids submitted by the plaintiff for constructing the pavement and other improvements set out in the bill, and the court further erred in holding that any additional contract was necessary between the parties after the formal acceptance of the bids submitted by the plaintiff, as set up in the pleadings, and the awarding of the contracts to him by the City of Oklahoma City, as shown in the pleadings and evidence herein.

Ninth. Because the court erred in holding that there was no completed contract between the complainant and the City of Oklahoma City, it having been provided in the specifications that a formal written contract should be subsequently executed by the respective parties.

Tenth. Because the court erred in holding that the action of the City of Oklahoma City by its resolution revoking the awards made to the complainant for the paving and other improvements set out in

the bill of complaint, did not impair the obligations of the contracts between the complainant and the City, and was not in violation of the Constitution of the United States, wherein it is provided that no State shall pass any law violating the obligation of a contract, and the court erred in not holding that the taking away from

226 the complainant by the resolution of the City of Oklahoma City of the awards theretofore made to him by said city for doing the paving and improvements set out in the bill, deprived the complainant of his property without due process of law, in violation of the Constitution of the United States.

Eleventh. Because the court erred in not reversing the judgment of the Circuit Court of the Western District of Oklahoma in the matters and particulars above set out, and in not remanding said cause to the District Court of the United States for the Western District of Oklahoma with directions to assess such damages as the complainant may have sustained by reason of the act of the City of Oklahoma City in depriving complainant of the profits and rights under his contracts.

JOHN DEVEREUX,  
B. F. BURWELL,  
*Attorneys for Complainant.*

(Endorsed:) No. 3690. In the U. S. Circuit Court of Appeals for the Eighth Circuit. David McCormick, Appellant, vs. City of Oklahoma City, et al. Assignment of Errors. Filed Apr. 11, 1913. John D. Jordan, Clerk. Burwell, Crockett & Johnson, Oklahoma City, Okla., Attorneys for Appellant.

*(Affidavit as to Amount in Controversy.)*

And on the eleventh day of April, A. D. 1913, an Affidavit as to Amount in Controversy was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

#—.

DAVID McCORMICK, Citizen and Resident of the City of St. Louis,  
State of Missouri, Complainant,

vs.

CITY OF OKLAHOMA CITY, a Corporation Duly Organized and Incorporated under the Laws of the State of Oklahoma; Henry M. Scales, as Mayor of the City of Oklahoma City; George Hess, as Clerk of the City of Oklahoma City; W. C. Burke, as  
227 City Engineer of the City of Oklahoma City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers, and R. F. Helm, as Councilmen within and for the City of Oklahoma City, Each of Whom Are Residents and Citizens of the Western Judicial District of the State of Oklahoma, Defendants.

*Affidavit as to Amount of Controversy.*

STATE OF OKLAHOMA,  
Oklahoma County, ss:

David McCormick, being first duly sworn, on his oath says that he is the complainant and appellant in the above entitled cause; that he is the same David McCormick to whom contracts were awarded by the Mayor and City Council of the City of Oklahoma City for the paving of certain streets set out in the bill of complaint appearing in the record herein; that the profits of this affiant, had he been permitted to perform said work by the Mayor and City Council of the City of Oklahoma City, exclusive of the cost of performing said work, and furnishing the material necessary therefor, and of performing the contracts on his part as set out in the record herein, would have exceeded the sum of One Hundred Thousand Dollars (\$100,000)—that is, the total cost of making said improvements by this affiant would have been \$100,000 less than the contract price as shown by the bids filed by this affiant and the awards made by the Mayor and City Council of Oklahoma City therefor, and that the matters referred to in controversy in this suit, and the amount so in controversy, exceeds the sum of \$100,000, exclusive of interest and costs.

DAVID McCORMICK.

Subscribed and sworn to before me this 3 day of April, 1913.

[SEAL.]

F. C. ANDREEN,

*Notary Public.*

My Commission expires June 20, 1915.

(Endorsed:) No. 3690. In the U. S. Circuit Court of Appeals for the Eighth Circuit. David McCormick, Appellant, vs. City of

Oklahoma City, et al. Affidavit as to amount in controversy.  
 228 Filed Apr. 11, 1913, John D. Jordan, Clerk. Burwell,  
 Crockett & Johnson, Oklahoma City, Okla., Attorneys for  
 Appellant.

*(Bond on Appeal to Supreme Court U. S.)*

And on the eleventh day of April, A. D. 1913, a Bond on Appeal to the Supreme Court, U. S., was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

#—.

DAVID McCORMICK, Citizen and Resident of the City of St. Louis,  
 State of Missouri, Complainant,

vs.

CITY OF OKLAHOMA CITY, a Corporation Duly Organized and Incorporated under the Laws of the State of Oklahoma; Henry M. Scales, as Mayor of the City of Oklahoma City; George Hess, as Clerk of the City of Oklahoma City; W. C. Burke, as City Engineer of the City of Oklahoma City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnson, C. E. McDavie, S. A. Byers, and R. F. Helm, as Councilmen within and for the City of Oklahoma City, Each of Whom Are Residents and Citizens of the Western Judicial District of the State of Oklahoma, Defendants.

*Bond on Appeal.*

Know all men by these presents: That we, David McCormick, as principal, and Foxhall P. McCormick and Arthur G. Stopp, as sureties, are held and firmly bound unto the City of Oklahoma City, and the other above named defendants, in the sum of Five Thousand (\$5,000) — , to be paid to the said defendants above named, heirs, executors, administrators, successors and assigns, and we bind ourselves, and each of our heirs, executors and administrators jointly and severally by these presents.

229 Sealed with our seals and dated this 11 day of April,  
 1913.

Whereas, David McCormick, appellant in the above entitled suit, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree entered in said cause in the United States Circuit Court of Appeals for the Eighth Circuit on the 22nd day of February, 1913.

Now therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all damages and costs if *they* fail to make said appeal good, then this

obligation shall be void; otherwise to remain in full force and virtue.

DAVID McCORMICK,  
FOXHALL P. McCORMICK,  
ARTHUR G. STOPP.

The foregoing bond and the sureties thereon, are hereby approved this 11th day of April, 1913.

WALTER H. SANBORN,  
*Presiding Judge of the United States Circuit  
Court of Appeals, Eighth Circuit.*

STATE OF MISSOURI,  
*City of St. Louis, ss:*

Foxhall McCormick, surety named in the foregoing bond, being first duly sworn, for himself says that he is a resident and freeholder in the City of St. Louis, State of Missouri, and is worth the sum of \$100,000 over and above all of his just debts and liabilities, exclusive of property exempt by law.

FOXHALL P. McCORMICK.

Subscribed and sworn to before me this 11 day of April, 1913.

[SEAL.]

WM. R. ORTHWEIN,  
*Notary Public in and for City of St. Louis,  
State of Missouri.*

My Commission expires Sept. 13-'13.

230 STATE OF MISSOURI,  
*City of St. Louis, ss:*

Arthur G. Stopp surety named in the foregoing bond, being first duly sworn, for himself says that he is a resident and freeholder in the County of St. Louis, State of Missouri, and is worth the sum of \$5,000.00 over and above all of his just debts and liabilities, exclusive of property exempt by law.

ARTHUR G. STOPP.

Subscribed and sworn to before me this 11 day of April, 1913.

[SEAL.]

WM. R. ORTHWEIN,  
*Notary Public in and for County of St. Louis,  
State of Missouri.*

My Commission expires Sept. 13-'13.

(Endorsed:) No. 3690. In the U. S. Circuit Court of Appeals for the Eighth Circuit. David McCormick, Appellant, vs. City of Oklahoma City, et al. Bond on Appeal. Filed Apr. 11, 1913, John D. Jordan, Clerk. Burwell, Crockett & Johnson, Oklahoma City, Okla., Attorneys for Appellant.

*(Order Allowing Appeal to the Supreme Court of the United States.)*

And on the eleventh day of April, A. D. 1913, an order allowing appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

#—.

DAVID MCCORMICK, Citizen and Resident of the City of St. Louis,  
State of Missouri, Complainant,

vs.

CITY OF OKLAHOMA CITY, a Corporation Duly Organized and Incorporated under the Laws of the State of Oklahoma;  
231 Henry M. Scales, as Mayor of the City of Oklahoma City;  
W. C. Burke, as City Engineer of the City of Oklahoma City; George Hess, as Clerk of the City of Oklahoma City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, S. A. Byers, and R. F. Helm, J. W. Johnson, and C. E. McDavie, as Councilmen within and for the City of Oklahoma City, Each of Whom Are Residents and Citizens of the Western Judicial District of the State of Oklahoma, Defendants.

*Order Allowing Appeal.*

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be and the same is hereby allowed as prayed.

WALTER H. SANBORN,  
United States Circuit Judge for the  
Eighth Circuit, Presiding.

Dated this 11th day of April, 1913.

(Endorsed:) No. 3690. In the U. S. Circuit Court of Appeals for the Eighth Circuit. David McCormick, Appellant, vs. City of Oklahoma City, et al. Order Allowing Appeal to the Supreme Court of the U. S. Filed Apr. 11, 1913, John D. Jordan, Clerk. Burwell, Crockett & Johnson, Oklahoma City, Okla., Attorneys for Appellant.

*(Citation and Acceptance of Service on Appeal to Supreme Court U. S.)*

And on the sixteenth day of April, A. D. 1913, a citation on appeal to the Supreme Court of the United States was filed in said cause, the original of which together with acceptance of service indorsed thereon is hereto attached and herewith returned.

232 In the United States Circuit Court of Appeals for the Eighth Circuit.

# —.

DAVID McCORMICK, Citizen and Resident of the City of St. Louis,  
State of Missouri, Complainant,

vs.

CITY OF OKLAHOMA CITY, a Corporation Duly Organized and Incorporated under the Laws of the State of Oklahoma; Henry M. Scales, as Mayor of the City of Oklahoma City; George Hess, as Clerk of the City of Oklahoma City; W. C. Burke, as City Engineer of the City of Oklahoma City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnston, C. E. McDavie, S. A. Byers, and R. F. Helm, as Councilmen within and for the City of Oklahoma City, Each of Whom are Residents and Citizens of the Western Judicial District of the State of Oklahoma, Defendants.

*Citation.*

United States Circuit Court of Appeals for the Eighth Circuit, United States of America, to the City of Oklahoma City, a Corporation Duly Organized and Incorporated under the Laws of the State of Oklahoma; Henry M. Scales, Mayor of said City; George Hess, Clerk of said City; W. C. Burke, Engineer of said City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnston, C. E. McDavie, S. A. Byers, and R. F. Helm, as Councilmen within and for said City of Oklahoma City, and each of them:

You, and each of you, are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein David McCormick is appellant, and  
233 you are appellees, to show cause, if any there be, why the decree rendered against said appellant should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 11th day of April, 1913.

WALTER H. SANBORN,  
*Presiding Judge of United States Circuit Court  
of Appeals for the Eighth Circuit.*

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OKLAHOMA CITY, OKLA., April 14, 1913.

We, the undersigned, City of Oklahoma City, a corporation duly organized and incorporated under the laws of the State of Okla-



homa; Henry M. Scales, as Mayor of the City of Oklahoma City; George Hess, as Clerk of the City of Oklahoma City; W. C. Burke, as City Engineer of the City of Oklahoma City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. P. Peshek, J. W. Johnston, C. E. McDavie, S. A. Byers, and R. F. Helm, as Councilmen within and for the City of Oklahoma City, each of whom are residents and citizens of the Western Judicial District of the State of Oklahoma, being the defendants in the case of David McCormick vs. City of Oklahoma City et al., and being the defendants named in the foregoing citation, hereby accept service of said citation, and enter our general appearance, for all purposes, in the Supreme Court of the United States in the above entitled cause, on the day and year last above written, as fully and completely as though said citation had been served upon each of us in the above entitled case as provided by law, and the rules of the Supreme Court of the United States, and the United States Circuit Court of Appeals for the Eighth Circuit, formal service of said citation being hereby expressly waived. The receipt of a true, full, correct and complete copy of the citation referred to is hereby acknowledged.

**CITY OF OKLAHOMA CITY,**

*A Corporation Duly Organized and Incorporated  
under the Laws of the State of Oklahoma;*  
**HENRY M. SCALES,**

*As Mayor of the City of Oklahoma City;*  
**GEORGE HESS,**

*As Clerk of the City of Oklahoma City;*  
**W. C. BURKE,**

*As City Engineer of Oklahoma City;*  
**MONT F. HIGHLEY,**

**A. W. McWILLIAMS,**

**W. T. CORDER,**

**O. P. WORKMAN,**

**L. L. LAND,**

**M. P. PESHEK,**

**J. W. JOHNSTON,**

**C. E. McDAVIE,**

**S. A. BYERS,**

**R. F. HELM,**

*As Councilmen for City of Oklahoma City,*

**By J. W. JOHNSON,**

*City Attorney & Solicitor for City of Oklahoma  
City, and Attorney and Solicitor of Record for  
Each and All of said Defendants, and*

**G. A. PAUL,**

*Att'y & Solicitor for Defendants.*

235 [Endorsed:] No. 3690. In the U. S. Circuit Court of of Appeals for the Eighth Circuit. David McCormick, Appellant, vs. City of Oklahoma City et al. Citation and Acceptance of Service. Filed Apr. 16, 1913. John D. Jordan, Clerk. Burwell, Crockett & Johnson, Oklahoma City, Okla., Attorneys for Appellant.

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*(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the Circuit Court of the United States for the Western District of Oklahoma, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, pursuant to the stipulation and agreement of the parties and upon which said cause was heard, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, in the United States Circuit Court of Appeals, in a certain cause in said Court wherein David McCormick is Appellant and The City of Oklahoma City, a municipal corporation, et al., are appellees, No. 3690, as full, true and complete as the originals of same remain on file and of record in my office.

I do further certify that the original citation with acceptance of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of May, A. D. 1913.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,  
*Clerk of the United States Circuit Court  
of Appeals for the Eighth Circuit.*

Endorsed on cover: File No. 23,680. U. S. Circuit Court Appeals, 8th Circuit. Term No. 170. David McCormick, appellant, vs. The City of Oklahoma City et al. Filed May 10th, 1913. File No. 23,680.



IN THE  
SUPREME COURT OF THE STATE OF OKLAHOMA

Case No. 10,000

\_\_\_\_\_

vs. \_\_\_\_\_

\_\_\_\_\_

DAVID MACOMBS, Appellant

THE CITY OF OKLAHOMA, Appellee

APPEAL FROM THE DISTRICT COURT OF  
THE COUNTY OF OKLAHOMA

FILED FOR RECORDED

CLERK OF THE SUPREME COURT

# David McCormick vs. City of Oklahoma City et al.

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*List of authorities in this Brief found  
at front of Appellant's Reply Brief.*

In the  
Supreme Court of the United States

October Term, 1914

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No. 170

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DAVID McCORMICK, APPELLANT,

*vs.*

THE CITY OF OKLAHOMA CITY ET AL.,  
APPELLEES.

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APPEAL FROM UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF CASE

This case involves the award of some eighteen contracts from the City of Oklahoma City to David McCormick for the paving of certain streets in the City of Oklahoma City, Oklahoma. The City Council duly passed the necessary resolutions providing for the paving of the streets in controversy and directed the City Engineer to prepare plans, profiles and specifications for the work to be performed, and the City Clerk was directed by the City Council to cause notices to be published, inviting bids from contractors for the performing of the work; all of the proceedings required by law were followed, and pursuant to



the notices published, the various bids by David McCormick were filed and his bids were accepted and the contracts awarded to him for the doing of the work. It is the position of the appellant that these proceedings constituted valid and completed contracts for the making of these improvements.

Subsequently, the Mayor and City Council attempted to vacate the awards and to award these various contracts to The Conway Company. David McCormick brought this suit in the United States District Court for the Western District of Oklahoma, for specific performance of his contracts and to enjoin the City of Oklahoma City and its officers, and The Conway Company and its employees, agents and representatives from in any way interfering with him in the discharge of his duties under his contracts for the paving these streets. The complainant was by the decree of the court denied all relief and from this judgment he prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit. That court affirmed the judgment of the lower court by its decree found on page 194 of printed record, and the opinion of the court handed down in this case is published under the title "McCormick vs. Oklahoma City et al," in the 203 Federal Reporter, at page 921. We will have occasion later in this brief to refer to this opinion and the rules of law announced therein and the authorities cited in support thereof.

To the end that the court may measure correctly the validity of the proceedings and as to whether or not the

awards under the circumstances constituted valid and binding contracts, we here insert in this brief Article 5 of Chapter 14 of Snyder's Compiled Laws of Oklahoma, 1909, which embrace the entire Paving Law then in force and under which the awards and contracts in controversy were entered into. Article 5 of Chapter 14 of Snyder's Compiled Laws of Oklahoma contains the entire Paving Law in force in Oklahoma at and prior to the time of the awarding of the contracts in controversy in this case to David McCormick. This Article comprises running or general sections from 722 to 733, inclusive, of the laws referred to above, and is found in that volume, beginning on page 329 and ending on page 336, and is as follows:

"SEC. 722. PAVING—GRADE—MATERIAL—STREET AND STEAM RAILWAYS.—The mayor and council of cities of the first class are hereby empowered to establish and change the grade of any streets, avenues, lanes, alleys, and other public places in such cities, and to permanently improve the same by paving, macadamizing, curbing, guttering and draining the same, including the installing of all manholes, catch basins, and necessary drainage pipes whenever, in their judgment, the public convenience may require such improvements, subject only to the limitations prescribed in this Act; provided, that any change of any grade established by the city shall not be made without making due compensation to the owners of abutting property for any damage thereby caused to the permanent improvements erected thereon, with reference to the previously established grade; provided, however, that the failure to make such compensation shall in no wise invalidate the assessments on the property chargeable therewith, as hereinafter provided; provided further, that all street railway companies operating within the said city shall

be required to pave, macadamize, curb, gutter or drain the portion of their track situated in such streets and two feet on each side thereof, as the remainder of said streets may be so improved, or such other material as the city may require, and when there are two or more tracks of any railway or street railway company upon one street, then said company shall be required to gravel, pave or macadamize as the city may require, also the space between said tracks; *Provided further*, that when a steam railway company shall occupy any portion of a street with its tracks running in the general direction of such street, either on or adjacent thereto, that the said steam railway company shall improve the space between its said tracks and two feet on either side thereof, in the same manner that said street shall be improved, and the same as is hereby required of street railway companies, and in case any steam railroad or street railway company shall occupy an alley with its track or tracks, such company shall be required to improve, gutter, drain, grade or pave such alley in the manner that may be required by the ordinance of such city, and where any railroad company shall cross with any street that is being or has been paved, the city council may require such railroad company to pave so much of said street as may be occupied by its track or tracks and two feet on each side, and when more than one track crosses such street within a distance of one hundred feet, said railroad company shall grade, gutter, drain, curb, pave or improve between its said tracks in the same manner as the city may be improving or has improved the other portion of said street and that the city may require, in addition to the improvement of such streets, as herein required, that said railroad company shall construct sidewalks with such material as the city may by ordinance require, upon either or both sides of such street, and that such street car company or railroad company shall maintain such improvements, keeping the same in repair at its own expense, using for such purpose the same material as is used for the original

paving, graveling, or macadamizing, or sidewalks, or such other material as the city may order, and if the owners of said steam railway or street railway shall fail or refuse to comply with the order of the city to make such improvements, by paving, graveling, macadamizing or sidewalking, as the city may direct or to repair such paving, graveling, macadamizing, or sidewalking, such work may be done by the city and the cost and expense thereof shall be charged against such steam railway or street railway company, and may be collected in the district court in the county in which such improvements have been made, by action at law, in the name of the city against such steam railway or street railway company, and in any action at law where pleadings are required, it shall be sufficient to declare generally for work or labor done, or material furnished, on the particular street, avenue, alley or highway, so improved; in addition to the remedy above provided for the collection of costs and expense of the paving, graveling, macadamizing, or sidewalking adjacent to steam and street railway tracks, as hereinabove provided, the city or anyone authorized by it to do the work, shall be entitled to a lien upon the property of said steam or street railway company, and such lien shall exist for the full amount of said cost and expense against the property of said steam or street railway company adjacent or contiguous to which said improvement or improvements shall be so made, and said lien may be enforced against the property of said steam railway or street railway company by action in the district court for the county in which said improvements have been made, and in any action in equity it shall be sufficient to declare generally that said lien exists for the amount of the cost and expense of the work and labor done or material furnished on the particular street, avenue, alley or highway so improved (L. 1907-8, p. 166).

“Sec. 723. IMPROVEMENTS AND PROCEDURE.—When the mayor and council shall deem it necessary to grade, pave, macadamize, gutter, curb, drain or otherwise im-

prove any street, avenue, alley or lane, or any part thereof, within the limits of the city for which a special tax is to be levied as herein provided, said mayor and council shall, by resolution, declare such work or improvement necessary to be done, and such resolution shall be published *in six* consecutive issues of a daily newspaper or two consecutive issues of a weekly newspaper, published and *having a general circulation within such city*; and if the owners of more than one-half in area of the land liable to assessment to pay for such improvement of any such highway shall not within fifteen (15) days after the last publication of such resolution, file with the clerk of said city their protest in writing against such improvement, then the mayor and council shall have power to cause such improvement to be made and to contract therefor and to levy assessments as herein provided, and any number of streets, avenues, lanes, alleys or other public places or parts thereof to be so improved may be included in one resolution, but such protest or objection shall be made as to each street or other highway separately; *Provided*, that if the owners of more than one-half in area of the land liable to assessment for any such improvement shall petition the mayor and council for such improvement of any street or part of street, alley, lane, or avenue, not less than one block in length, describing in such petition the character of the improvement desired, the width of the same and the material preferred by the petitioners for such improvement, it shall thereupon be the duty of the mayor and council to promptly cause the said improvement to be made in accordance with the prayer of said petition, and in such case the resolution hereinbefore mentioned shall not be required; *Provided further*, that any property which shall be owned by the city or county in which such is located, or any board of education or school district, shall be treated and considered the same as the property of other owners within the meaning of the provisions of this act, and the property of any city, county, school district and board of education within

the district to be assessed, shall be liable and assessed for its proper share of the costs of such improvements, in accordance with the provisions of this Act (L. 1907-8, p. 168).

“An Act to amend section 3 of chapter 10 of Session Laws 1907-8, of ‘An Act entitled, “An Act to provide for the improvement of streets and other public places within cities of first class, by grading, paving, macadamizing, curbing, guttering and draining the same,” and declaring an emergency. Approved April 17, 1908.’

“Sec. 724. PROPERTY ASSESSED—CROSSINGS—PROPERTY NOT PLATTED.—The lots, pieces, or parcels of land fronting and abutting upon any such improvement shall be charged *with the cost thereof to the center of the block where the abutting way is on the exterior of the block, and to the exterior of the block where the improvement is made of any alley or other public way in the interior of such block, and each quarter block shall be charged with its due proportion of the cost of so improving both the front and the side streets on which said block abuts together with the areas formed by street intersections and alley crossings, except such portion of such street intersections and alley crossings as may be used by street or steam railways, which cost shall be apportioned among the lots and sub-divisions of such quarter block according to the benefits to be assessed to each lot or parcel, as hereinafter provided; Provided, that in case of an alley extending through a block which shall not be in the center of the block, then assessment shall be made upon the property extending from the exterior of the block to such alley; and when triangular or other irregular shaped lots or tracts are to be assessed for any such improvements, any part of the costs of such improvements in excess of the benefits accruing to such lots or tracts shall be borne by the city and paid from the street and bridge fund of such city; Provided further, that the mayor and council may in their discretion provide for the payment of the*

cost of improving street intersections and alley crossings, which cost shall be provided for and paid by said city, and for the purpose of paying such expenses a special and separate levy shall be made and entered against all the property of the said city at the next annual tax levy, after such estimate is made, which said expense shall embrace the pro rata part of the expense of advertising and making profiles and specifications together with the expense charged by the city engineer, superintendents and in all other respects, but the city may at its option, arrange for its payment in three equal annual payments, and the board of appraisers appointed for ascertaining and assessing such costs shall apportion in their assessment a portion of such expense as may be charged to the street or steam railway companies, or either of them, and to the city. If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the mayor and council shall include such property in proper quarter block district for the purpose of appraisalment, and assessment, as herein provided; *Provided*, that whenever the petition provided for in Section Two of this act (723) is presented, or when the mayor and city council shall have determined to pave or improve any streets, avenues, lane, alley, or other public place, and shall have passed the resolution provided for in section two of this act (723), that the mayor and council shall then have the power to *enact all ordinances and to establish all such rules and regulations* as may be necessary to require the owners of all property subject to assessment to pay the costs of such improvement, to cause to be put in and constructed all water, gas, or sewer pipe connections, to connect with any existing water, gas or sewer pipe in and underneath the streets, avenues, lanes and alleys and other public places where such public improvements are to be made, and all costs and expenses for making such connections shall be taxed against such property and shall be included and made a part of the general assessment to cover the cost of such improvement. (L. 1909. H. B. 401.)



“Sec. 725. RESOLUTION—PLANS—CONTRACTOR’S BOND—ADVERTISEMENT—PUBLICATION—AWARD.—After the expiration of the time for objection or protest on the part of property owners, if no sufficient protest be filed, or on receipt of a petition for such improvement signed by the owners of more than one-half in area of the land to be assessed, if such petition shall be found to be in proper form and properly executed, the mayor and council shall adopt a resolution reciting that no such protest has been filed or the filing of such petition, as the case may be, and expressing the determination of the council to proceed with the improvement, defining the extent, character, and width of the improvement, stating the material to be used and the manner of construction and such other matters as shall be necessary to instruct the engineer in the performance of his duties in preparing for such improvement, the necessary plans, plats, profiles, specifications, and estimates. Said resolution shall set forth any such reasonable terms and conditions as the mayor and council shall deem proper to impose with reference to the letting of the contract and the provisions thereof; and the mayor and council shall, by said resolution, provide that the contractor shall execute to the city a *good and sufficient bond*, in an amount *to be stated in such resolution*, condition for the full and faithful execution of the work and performance of the contract and for the protection of the city and all property owners interested against any loss or damage by reason of the negligence or improper execution of the work, and may require a bond in an amount to be stated in such resolution for the maintenance in good condition of such improvement for a period of not less than five years from the time of its completion, or both, in the discretion of the mayor and council.

“Said resolution shall also direct the city clerk to advertise for sealed proposals for furnishing the materials and performing the work necessary in making such improvement. The notice for such proposals shall state the street, streets, or other public places

to be improved the kinds of improvements proposed, what, if any, bond or bonds will be required to be executed by the contractor as aforesaid and shall state the time when and the place where such sealed proposals shall be filed and when and where the same will be considered by the mayor and council.

“Said notice shall be published in *ten consecutive issues of a daily newspaper* or two consecutive issues of a weekly newspaper published and of general circulation in said city.

“At the time and place specified in such notice, the mayor and council shall examine all bids received, and without necessary (unnecessary) delay award the contract to the lowest and best bidder, who will perform the work and furnish the materials which may be selected and perform all the conditions imposed by the mayor and council as prescribed in such resolution and notice for proposals, which contract shall in no case exceed the estimate of cost submitted by the engineer with the plans and specifications, and the mayor and council shall have the right to reject any and all bids and to re-advertise for other bids when any such bids are not, in their judgment, satisfactory (L. 1907-8, p. 170).

“726. APPRAISERS—REPORTS — COMPLAINTS — ASSESSMENTS—BONDS.—As soon as the contract is let and the cost of such improvement, which shall also include all other expenses incurred by the city incident to said improvement in addition to the contract price for the work and materials, is ascertained, the mayor and council shall, by resolution, appoint a board of appraisers, to appraise and apportion the benefits to the several lots and tracts of land which shall be designated in said resolution, which board of appraisers shall consist of three disinterested freeholders of the city, not owners of any property to be assessed, and it shall be the duty of said appraisers, within five days after being notified of their appointment to proceed to appraise and apportion the benefits to such lots and tracts of

land as shall have been designated by the council, after having taken and subscribed an oath to make a true and impartial appraisement and apportionment, and a written report of such appraisement and apportionment shall be returned and filed with the city clerk within ten days from the date of the appointment of such appraisers. Such appraisers shall each be paid not to exceed five dollars for each day while actually employed in such service; *Provided*, that the acts of a majority of said appraisers shall have like force and effect as the act of all. When said report shall have been so returned, the mayor and council shall appoint a time for holding a session on some day to be fixed by them to hear any complaints or objections that may be made concerning the appraisement and apportionment as to any of such lots or tracts of land, and notice of such session shall be published by the city clerk in five successive issues of a daily newspaper or two issues of a weekly newspaper published and of general circulation in said city and the time fixed for said hearing shall be not less than five, nor more than ten days from the last publication. The mayor and council at said session shall have the power to review and correct said appraisement and apportionment and to raise or lower the same, as to any lots or tracts of land as they shall deem just and shall, by resolution, confirm the same as so revised and corrected by them. Assessments in conformity to said appraisement and apportionment as corrected and confirmed by the council shall be payable in ten equal annual installments, and shall bear interest at the rate of seven per cent per annum until paid, payable in each year at such time as the several installments of the assessments are made payable each year. The mayor and council shall by ordinance levy assessments in accordance with said appraisement and apportionment as so confirmed against the several lots and tracts of land liable therefor.

“The first installment of said assessments, together with interest to that date upon the whole shall be due

and payable on the first day of September next succeeding the passage of said ordinance and one installment, with the yearly interest upon the amounts remaining unpaid, shall be payable on the first day of September in each succeeding year until all shall be paid; *Provided, however*, that in case said assessment and interest is not paid when due, the assessment so matured and unpaid shall bear interest at the rate of eighteen per centum per annum until paid; *Provided, further*, that if such assessing ordinance shall be passed after the first day of August in any year, the first installment of such assessment and interest shall be due and payable on September first of the following year. Said ordinance shall also provide that the owners of the property so assessed shall have the privilege of paying the amounts of their respective assessments within thirty days from the date of the passage of said ordinance. The owners of property so assessed shall be allowed to make payment of their respective assessments without interest within said period of thirty days to the city clerk, and thereby relieve their property from the lien of said assessment, which money so paid to the city clerk shall be by him disbursed pro rata between the contractor and the city in proportion to the respective interests.

“Such special assessments and each installment thereof, and the interest thereon are hereby declared to be a lien against the lots and tracts of land so assessed, from the dates of the ordinances levying the same co-equal with the lien of other taxes, and prior and superior to all other liens against such lots or tracts and such lien shall continue until such assessments and interest thereon shall be fully paid, but unmatured installments shall not be deemed to be within the terms of any general covenant or warranty.

“The mayor and council, after the expiration of said thirty days, shall by resolution provide for the issuance of bonds in the aggregate amount of such assessments remaining unpaid, bearing date fifteen days after the

passage of the ordinance levying the assessments and of such denominations as the mayor and council shall determine, which bond or bonds shall in no event become a liability of the city issuing the same.

“One-tenth in amount of any such series of bonds, with the interest upon the whole series to that date, shall be payable on the fifteenth day of September next succeeding the maturity of the first installment of the assessments and interest and one-tenth thereof with the yearly interest upon the whole amount remaining unpaid shall be payable on the fifteenth day of September in each succeeding year until all shall be paid. Such bonds shall bear interest at a rate not exceeding six per cent per annum from their date until maturity, payable annually, and ten per cent from maturity until paid, and shall be designated as ‘Street Improvement Bonds,’ and shall on the face thereof recite the street or streets, part of street or streets or other public places for the improvement of which they have been issued, and that they are payable solely from assessments, which have been levied upon the lots and tracts of land benefited by said improvement under authority of this Act. Said bonds shall be signed by the mayor and attested by the city clerk of said city and shall have the impression of the corporate seal of such city thereon, and shall have interest coupons attached, and all bonds issued by authority of this Act shall be payable at such place either within or without the State of Oklahoma as shall be designated by the council.

“Said bonds shall be sold at not less than par, and the proceeds thereof applied to the payment of the contract price and other expenses, by the mayor and council, or such bonds, in the amount that shall be necessary for that purpose may be turned over and delivered to the contractor at par value in payment of the amount due him on his contract, and the portion thereof which shall be necessary to pay other expenses incident to and incurred in providing for such improvement shall be sold or otherwise disposed of as the mayor and council shall direct. Said bonds shall be

registered by the city clerk of the city issuing them in a book to be provided for that purpose, and certificates of registration by said city clerk shall be endorsed upon each of said bonds. (L. 1907-8, p. 172.)

“Sec. 727. COLLECTION, PAYMENT AND NOTICE OF ASSESSMENT—DELINQUENTS.—The assessments provided for and levied under the provisions of this Act shall be payable by the persons owning the same as the several installments become due, together with interest thereon, to the city clerk of such city, who shall give proper receipts for such payments. The city clerk shall be required to execute a good and sufficient bond with sureties, and in an amount to be approved by the mayor and council, payable to the city conditioned for the faithful performance of the duties enjoined upon him by this Act as collector of said assessments.

“It shall be the duty of the city clerk to keep an accurate account of all such collections by him made, and to pay to the city treasurer daily the amounts of such assessments collected by him and the amounts so collected and paid to the city treasurer shall constitute a separate special fund to be used and applied to the payment of such bonds and the interest thereon and for no other purpose.

“It shall be the duty of such city clerk, not less than thirty days and not more than forty days, before the maturity of any installment of such assessments, to publish in two successive issues of a daily paper, or in one issue of a weekly newspaper, published and of general circulation in said city, a notice advising the owner of the property affected by such assessment of the date when such installment and interest will be due and designating the street, streets or other public places for the improvement of which such assessments have been levied, and that unless the same shall be promptly paid shall bear interest at the rate of eighteen per cent per annum thereafter until paid, and proceedings taken according to law to collect said installment and interest; and it shall be the duty of the city

clerk promptly after the date of maturity of any such installment of assessment and interest and on or before the fifteenth day of September in each year to certify said installment and interest then due to the county treasurer of the county in which said city is located, which installment of assessment and interest shall be by said county treasurer placed upon the delinquent tax list of said county for the current year and collected as other delinquent taxes are collected and thereupon pay to the city treasurer for disbursement in accordance with the provisions of this Act; *Provided*, that failure of the city clerk to publish said notice of maturity of any installment of said assessment and interest shall in no wise affect the validity of the assessment and interest. (L. 1907-8, p. 175.)

“Sec. 728. **SUITS.**—No suit shall be sustained to set aside any such assessment, or to enjoin the mayor and council from making any such improvement, or levying or collecting any such assessments, or issuing such bonds, or providing for their payment as herein authorized, or contesting the validity thereof on any ground or for any reason other than for the failure of the city council to adopt and publish the preliminary resolution provided for in Section Two (723) in cases requiring such resolution and its publication and such suit shall be commenced within sixty (60) days to give the notice of the hearing on the return of the appraisers provided for in Section Five (726) unless such suit shall be commenced within sixty (60) days after the passage of the ordinance making such final assessment; *Provided*, that in the event that any special assessment shall be found to be invalid or insufficient in whole or in part for any reason whatsoever, the city council may, at any time in the manner provided for levying an original assessment, proceed to cause a new assessment to be made and levied, which shall have like force and effect as an original assessment. (L. 1907-8, p. 176.)

“Sec. 729. **PROCEDURE SAME FOR REPAVING, REGUTTERING AND REDRAINING.**—In all cases where the



city council shall deem it necessary to repave, remacadamize, recurb, regutter, redrain or otherwise improve any street, avenue, alley, lane, or any part thereof which shall have been therefore (heretofore) paved, macadamized, curbed, guttered, or drained, such improvement is authorized to be done under and in pursuance of the provisions of this Act and in such case all provisions of this Act in providing for making such improvements and levying assessments therefor and the issuance of bonds shall apply. (L. 1907-8, p. 176.)

“Sec. 730. PUBLICATION OF NOTICES.—That the publication of all notices in a daily newspaper called for in this Act shall be the number of days therein specified exclusive of Sundays and legal holidays (L. 1907-8, p. 177).

“Sec. 731. STORM SEWERS.—The mayor and council shall have the power to levy a tax not exceeding five mills in any one year upon all taxable property of said city, for the purpose of constructing storm sewers and outlets in connection with the construction of the improvements herein provided for (L. 1907-8, p. 177).

“Sec. 732. OLD LAWS EXTENDED OVER WORK UNDER CONSTRUCTION.—In such cities any such improvements in process of being constructed under the laws heretofore in force in this State or for which proceedings have been commenced under such laws at the time this Act takes effect, shall be completed and paid for under such laws, and said laws are hereby extended in force as to such improvements until such improvements shall be completed and paid for as by such laws provided; *Provided*, that this Act shall not validate in whole or in part any invalid ordinance or resolution or parts thereof (L. 1907-8, p. 177).

“Sec. 733. REPEAL.—That article two of chapter eight of the Session Laws of Oklahoma, 1901, and all other Acts in conflict herewith be and the same are hereby repealed (L. 1907-8, p. 177).”

Under this statute, as will be observed by the reading of section 723 thereof, the first step to be taken looking toward the paving of the streets is the passing of a resolution by the Mayor and City Council, in which they declare such work or improvement to be a necessity, and then such resolution is published in six consecutive issues of some daily newspaper, or two consecutive issue of a weekly newspaper.

This resolution was passed by the Mayor and City Council, pertaining to the various streets in controversy, and published as provided by law. This particular work involves Paving Resolution No. 1, found on pages 139 and 140 of printed record; Paving Resolution No. 2, found on pages 140 and 141 of printed record, and Paving Resolution No. 4, found on page 141 of printed record. These different resolutions are exactly the same except that they describe different streets. Therefore, for convenience and for the purpose of shortening this brief, we will copy in this brief only Paving Resolution No. 1 (see page 139 of printed record) which is as follows:

“PAVING RESOLUTION No. 1.

“A Resolution to Pave a Portion of Certain Streets and Avenues.

*“Be it Resolved by the Mayor and City Council of Oklahoma City, Oklahoma.*

“First. That it is necessary to pave 11th Street from W. line of the A. T. & S. F. R. R. Right of Way to the E. line of Robinson Ave.”

And then follows a description of a number of streets. After giving the description of the streets to be paved in the resolution to be published, then follows this language:

“All in the City of Oklahoma City, Oklahoma, to do the necessary concreting, to construct manholes and catch basins and to put in the inlet pipes, lateral storm sewers, curbs and reset curbs therefor.

“Second: That if the owners of more than one-half in area of the lots, pieces or parcels of ground liable to assessment for the cost of these improvements with assessment shall include the cost of improving the streets and alleys intersections, do not within fifteen (15) days after the last publication of this resolution file with the clerk of said city their protest in writing against such improvements, such protest or objection to be made as to each of the above named street separately, then the Mayor and City Council shall cause such improvements to be made and constructed, all at the expense of the said lots, pieces or parcels of ground as provided for in House Bill No. 231 of the Legislature of the State of Oklahoma, dated April 17, 1908, entitled:

“‘An Act to provide for the improvement of streets and other public places within cities of the first class by grading, paving macadamizing, curbing, guttering, and draining the same and declaring an emergency.’

“Third: That this resolution shall be published in six consecutive issues of the Oklahoma City Times, a daily newspaper published and of general circulation in said city.

“Approved and adopted this 21st day of September, 1908.

(Seal)

“HENRY M. SCALES, *Mayor*.

“Attest: George Hess, *City Clerk*.”

This and the other two resolutions, Nos. 2 and 4, were published as provided by law.

Section 725 of the law above quoted expressly provides:

“That after the expiration of the time for objection or protest on the part of the property owners, if no sufficient protest be filed, or on receipt of petition for such improvements signed by the owners of more than one-half in area of the land to be assessed, if such petition shall be found to be in proper form, and properly executed, the mayor and city council shall adopt a resolution reciting that no such protest has been filed or the filing of such petition, as the case may be, and expressing the determination of the council to proceed with the improvements, defining the extent, character, and width of the improvement, stating the material to be used and the manner of construction and such other matters as shall be necessary, and to instruct the engineer in the performance of his duties in preparing for such improvements the necessary plans, plats, profiles, specifications and estimates; said resolution shall set forth in such reasonable terms and conditions as the mayor and council shall deem proper to emphasize with reference to the letting of the contract and the provisions thereof; and the mayor and council shall by said resolution provide that the contractor shall execute to the city a good and sufficient bond in an amount to be stated in such resolution, conditioned for the full and faithful execution of the work and the performance of the contract, and for the protection of the City and all property owners interested against loss or damage by reason of the negligence or improper execution of the work, and may require a bond in an amount to be stated in such resolution for the maintenance in good condition of such improvements for a period of not less than five years from the time of its completion or both in the discretion of the mayor and council.”

Pursuant to that portion of Section 725 of the Compiled Laws of Oklahoma (Snyder's, 1909), the Mayor and City Council passed a resolution directing the City Engineer to prepare plans and specifications for the terms and

conditions under which the work was to be performed and directing the City Clerk to give notice inviting bids for the performance of the same. These resolutions are as follows:

“A resolution of the Mayor and City Council of the City of Oklahoma City:

*“Be it Resolved by the Mayor and City Council of the City of Oklahoma City, Oklahoma.*

“Whereas, a resolution has been passed by the said Mayor and City Council and regularly published in six consecutive issues of an official paper of said city, providing for certain improvements to be made on certain streets and avenues as hereinafter described;

“And Whereas, the time for objection or protest on the part of the property owners has expired, and no sufficient protest or objection having been filed, and that all of the proceedings have been regular and in due form as provided by law and the said Mayor and City Council having determined to proceed with such improvements in accordance with such resolution;

“Be it Resolved, therefore, that Shartel Ave. from the north line of Sixteenth Street following said point at which the same intersects the west line of said avenue where the same takes a due north course be paved a total width of 30 ft. from face of curb to face of curb.”

And here follows a specific description of the various streets to be paved. Then concluding:

“All of said streets being in the City of Oklahoma City, Oklahoma, and that the material to be used in the paving of the roadways of said streets shall be 1½ inches of sheet asphalt, 1½ inches of binder and 5 inches of Portland cement concrete base and that the necessary grading be done and catch basins, manholes, concrete curb and guttering and draining be constructed therefor and that the city engineer of said city be, and he hereby is authorized and directed to prepare plans

and plats, profiles, estimates and specifications for such construction.

“It is further resolved that all the work done and material furnished shall be in strict conformity to the plans and specifications of the city engineer therefor and of the proper quality and tests. That the contractor to whom a contract shall be awarded for the construction of such improvements shall execute to the city a good and sufficient bond in a sum equal to 20% of the contract price conditioned for the faithful performance of the work and the execution of the contract and for the protection of the said city and all property owners against any and all loss or damage by reason of neglect or improper execution of the work and the said contractor shall also execute good and sufficient bond in a sum of 10% of the contract price conditioned for the maintenance of such work in a state of good repair for a period of not less than five years from the date of the completion and acceptance of such work.

“Be It Further Resolved, that the city clerk of said city be and he is hereby authorized and directed to advertise for sealed bids for furnishing the materials and performing the work necessary to and for the improvement of such streets in the manner required by law, and each bid to be accompanied by certified check in the sum of three per cent of the amount of the bid, to be forfeited to the city in case the successful bidder fails to enter into the contract and give the required bond within the required time.

“Passed by the council this 19th day of October, 1908.

“Approved by the Mayor this 19th day of October, 1908.

(Seal)

“HENRY M. SCALES, *Mayor*.

“Attest:

“GEORGE HESS, *City Clerk*.”

Pursuant to this resolution and direction by the Mayor and City Council, the City Engineer prepared plans, plats,

profiles, estimates and specifications for such construction. A copy of the general specifications for such improvements is found in the printed record, beginning on page 40 and ending on page 62 thereof and is marked "Exhibit A" to the original bill.

The maps and profiles are not printed in the record because it was agreed in a stipulation that they were not necessary in determining the questions involved in this case, as they were merely blue prints showing the width of the streets, locating the places of catch basins, manholes, etc., merely detailed drawings of the work to be done.

Thereafter, pursuant to the resolution of the Mayor and City Council directing the City Engineer to prepare plans, profiles, specifications, etc., and directing the City Clerk to give notice to prospective contractors so that they might bid for such improvements, the City Clerk published notices therefor. Copy of the notice, marked "Exhibit D," is found on page 143 of the printed record and is as follows:

"EXHIBIT D."

"NOTICE TO PAVING CONTRACTORS.

"(Published Oct. 21-31, 1908.)

"In accordance with a resolution passed by the Mayor and Council, October 19, 1908, sealed bids will be received at the office of Geo. Hess, City Clerk, up to 5 o'clock p. m., November 2, 1908, and will be considered by the Mayor and Council at the Council chamber in the city hall at 8 o'clock p. m., on said date for the paving of the following streets, according to the plans and specifications now on file in the office of the City Clerk. Bids to be received on each street separately.



Broadway from the N. line of 13th St. to the S. line of 14th St. \* \* \*

And here follows a long list of streets giving the particular location of the improvements to be made upon them respectively, and which includes the streets in controversy in this case. And then the notice concludes:

"Be paved its total width from property line to property line, all of said streets being in the city of Oklahoma City, and be paved with asphalt. Each bid must be accompanied by certified check in the sum of three per cent (3%) of the amount bid to be forfeited to the city in case the successful bidder fails to enter into a contract and give the required bond within the required time. Contractor will be required to give bond in the sum of twenty per cent (20%) of the contract price for the faithful performance of said work, and the holding of the city harmless from any and all damages which might occur. Bids will be received for both five year and ten year guaranty. Also contractor will be required to give a bond in the sum of ten per cent (10%) of the contract price as a guaranty of keeping the pavement in a state of good repair for a period of five years if bids are accepted on the five year guaranty, and in a state of good repair for a period of ten years if bids are accepted on the ten year guaranty. The contractor shall receive for the above work Street Improvement Bonds at par value against the abutting property according to House Bill No. 231. Approved April 17, 1908.

"No proposals will be considered on any street which does not contain a bid upon every item included in the estimate of the City Engineer for such street.

"Council reserves the right to reject any or all bids.  
(Seal)

"GEO. HESS, *City Clerk.*"

The notices covering the other streets were each and

all in exactly the same language as the one quoted above, except they described different streets.

Pursuant to these resolutions of the Mayor and City Council and the notice published by the City Clerk, David McCormick filed proposals offering to do the work. One of these proposals will be found on page 146 of printed record and is as follows:

“Proposal of McCormick to pave Nineteenth Street:

“Form of Proposal:

“Oklahoma City, Nov. 2, 1908.

“To the Hon. Mayor and City Council:

“City.

“Gentlemen:

“The undersigned agree to furnish all the necessary tools, labor and material for the paving of 19th St. from Dewey to Western and to perform the work in the manner and under the conditions required by the specifications therefor, at the following prices, to-wit:

	5 yrs	10 yrs.
Sheet Asphalt Pavement, inc. 6" Portland cement concrete foundation .....	per sq. yd. \$ 2.02	\$2.09
Earth Excavation .....	per cu. yd. .35	.35
Rock Excavation .....	per cu. yd. .....	.....
Embankment .....	per cu. yd. .....	.....
Str. Concrete curb and gutter, rad. 6" curb ..	per lin. ft. .74	.74
Rad. concrete curb and gutter, ctr. 6" curb....	per lin. ft. .74	.74
Str. concrete curb and gutter, 4" curb .....	per lin. ft. .....	.....
Rad. concrete curb and gutter .....	per lin. ft. .....	.....

Resetting concrete curb and gutter . . . . .per lin. ft.	.....	.....
Resetting stone curb...per lin. ft.	.....	.....
Concrete double gutter..per lin. ft.	.74	.74
Concrete single gutter ..per lin. ft.	.....	.....
3" Oak header .....per lin. ft.	.15	.15
Vit. Pipe in place, in- cluding back-fill		
10 inch .....per lin. ft.	.60	.60
12 inch .....per lin. ft.	.80	.80
15 inch .....per lin. ft.	1.00	1.00
18 inch .....per lin. ft.	.....	.....
21 inch .....per lin. ft.	.....	.....
24 inch .....per lin. ft.	2.30	2.30
27 inch .....per lin. ft.	2.60	2.60
Manholes, complete .....each	40.00	40.00
Catch basins .....each	20.00	20.00

"I agree to commence work within.....days after signing the contract and to complete same within six months after commencement. Herewith, certified check for Six Hundred Thirty and no/100 dollars (\$630.00), as required.

(Signed) "David McCormick,  
"Contractor,  
"By .....Agent."

All of the other seventeen proposals involving streets in controversy were in exactly the same language as the one just quoted, except they described different streets and were for different amounts.

The latter of Section 725 of the statute referred to above provides as follows:

"At the time and place specified in such notices the mayor and council shall examine all bids received and without necessary (unnecessary) delay award the contract to the lowest bidder and best bidder who will

perform the work and furnish the materials which may be selected and perform all the conditions imposed by the mayor and council as prescribed in such resolution and notice for proposals, which contract shall in no case exceed the estimate of cost submitted by the engineer with the plans and specifications, and the mayor and council shall have the right to reject any and all bids and to re-advertise for other bids when any such bids are not in their judgment satisfactory."

The mayor and city council met pursuant to the notice, for the purpose of considering the various bids and awarding the contracts. The record of this meeting is shown by Council Journal No. 12 and is as follows: (See page 79 of printed record):

"Minutes of Meeting of the City Council, November 2, 1908.

"Meeting of November 2, 1908.

"Bids were opened and read for the constructing of paving as per advertisements for bids, ending at 5 o'clock p. m. November 2, 1908."

The notice published by the city clerk pursuant to the resolution of the city council invited bids both upon a five and a ten year maintenance guaranty. At the meeting of the city council on November 4, 1908, as shown by Council Journal No. 12, at page 227, the following proceedings were had (See page 79 of printed record):

"Moved by Mr. Byers, seconded by Mr. McWilliams that the council reject all bids for asphalt paving based on five year guaranty; motion carried by unanimous roll call vote.

"Moved by Mr. McDavie, seconded by Mr. McWilliams, that all bids of J. F. Hill for paving of the dif-

ferent streets as per advertisement for bids, ending at 5 o'clock p. m., November 2, 1908, be rejected and not considered, as samples of materials to be used submitted by him were not in accordance with specifications of the city engineer for this work. Motion carried by unanimous roll call vote.

"Moved by Mr. Helm, seconded by Mr. Land, that all bids for asphalt paving be rejected and the clerk instructed to readvertise for bids for this work.

"Moved by Mr. McDavie, seconded by Mr. McWilliams, as a substitute for Mr. Helm's motion that the bids for asphalt paving be taken up street by street, and contracts awarded to the lowest and best bidder.

"Substitution motion carried by roll call vote."

*It will be observed that at this meeting all bids for asphalt paving based on five year guaranty were rejected.*

Then the mayor and city council met again on that day at 2:30 p. m. and the proceedings as shown by Council Journal No. 12, at page 228 (See page 79 of printed record, being "Exhibit F" thereof), are as follows:

"Minutes of Meeting of City Council, November 5, 1908, awarding contracts for paving certain streets to David McCormick."

(This date is evidently a misprint. It should have been November 4, 1908.)

"Oklahoma City, Okla., November 4, 1908.

"Council met in adjourned session at 2.30 p. m. with mayor and following members present: Highley, Workman Helm, Peshek, Johnston, McWilliams, McDavie, Land, and Byers came in later.

“Moved by Mr. Workman, seconded by Mr. Helm, that council reconsider action taken at meeting held in forenoon of this date ‘that the bids for asphalt paving be taken up street by street and contracts awarded to the lowest and best bidders.’ Motion lost by the following roll call vote: Ayes: Workman, Helm. Nays: Highley, Peshek, Johnston, McWilliams, McDavie, and Byers.

“City Engineer Burke reported that the bid of David McCormick was the lowest and best for the paving of Second Street from the west line of Western Ave., to the north line of Blackwelder Ave., Oklahoma City, Oklahoma.

“The bids were as follows:

“David McCormick:

Asphalt paving inc. 5" Portland C. Con.

Found. 10 y. Guar. per sq. yd. ....	\$ 2.10
Earth Excavation per cu. yd. ....	.35
Concrete curb. and Gut. Str. 6" curb. per lin. ft. ....	.75
Concrete curb. and Gut. rad. 6" curb per lin. ft. ....	.75
Concrete double gutter, per lin. ft. ....	.75
3" Oak Header per lin. ft. ....	.15
Vit. Pipe in place with back fill, per lin. ft. 10", 60c; 12", 80c; 18", \$1.55; 21", \$1.75; 15", \$1.00.	

Manholes complete at ..... 40.00

Catch Basins at ..... 20.00

Approx. Total .....\$23558.25

R. F. Conway Total ..... 23574.00'

“Moved by McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Peshek, Johnston, McWilliams, and McDavie. Nays: Messrs. Workman, Helm and Land.”

At this same meeting as shown by Council Journal No. 12 (See pages 79 and 80 of printed record), City Engineer Burke reported the bids of David McCormick for each and all of the streets involved in this case to be the lowest and best bids and the bids of David McCormick were accepted and he was awarded the contracts for the paving of these streets, which record was in the same language as the one above quoted. The record, however, includes a description of the price and of the particular work to be done on the other various streets. The acceptance of these various bids of David McCormick at this meeting and the awarding of the contracts to him, as shown by Council Journal No. 12, appears in the printed record beginning on page 79 and ending on page 89.

When all of these contracts had been awarded to David McCormick, and at the same meeting on November 4, 1908, a motion was made to rescind the awards of the contracts to him, which was lost. These proceedings appear in Council Journal No. 12 at page 242 (See page 89 of printed record), and are as follows:

“Oklahoma City, Oklahoma, Nov. 4, 1908.

“Moved by Mr. Helm, seconded by Mr. Workman, that the action of the Council in awarding contract for asphalt paving at this meeting be rescinded. Motion lost by the following roll call vote: Ayes: Workman, Helm and Land. Nays: Highley, Peshek, Johnston, McWilliams, McDavie and Byers.”

By the foregoing proceeding it is contended by the appellant, David McCormick, that valid and binding contracts



were entered into between him and the City of Oklahoma City for the paving of the eighteen streets involved in this case.

Then thereafter, on the 9th day of November, 1908, at another meeting of the Mayor and City Council, the following proceedings were had, as shown by Council Record No. 12 at page 248 (See page 89 of printed record, being "Exhibit G"):

"Oklahoma City, Oklahoma, November 9, 1908.

"Moved by Mr. Highley, seconded by Mr. Helms, that the council reconsider the action taken at the meeting held Nov. 4, 1908, 'In rejecting all bids for asphalt pavement based on five years guarantee.' Motion carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Peshek, Johnston and Land. Nays: McWilliams, McDavie and Byers.

"Moved by Mr. Highley, seconded by Mr. Corder, that the council reconsider the action taken at the meeting held November 4, 1908, in awarding the contracts for all asphalt paving.

"Moved by Mr. Land, seconded by Mr. McWilliams, that the council adjourn to meet at ten o'clock a. m. November 10, 1908, to give City Attorney Taylor an opportunity to investigate the law in regard to the legality of above motion of Mr. Highley. Motion carried."

The City Council then met on November 10, 1908, and the following proceedings were had as shown by Council Record (Journal) No. 12, page 250 (See printed record, page 90, being "Exhibit H"):

“Minutes of Meeting of City Council, November 10, 1908.

“Oklahoma City, Okla., Nov. 10, 1908.

“Council met in adjourned session at eleven o'clock a. m., with the Mayor and the following members present: Messrs. Highley, Workman, Helm, Corder, Peshek, McWilliams, McDavie, Land and Byers.

“Moved by Mr. McDavie seconded by Mr. Peshek, that the council adjourn to meet November 11, 1908, at 8 o'clock p. m., to give the city attorney further time in which to investigate the law in regard to Mr. Highley's motion to reconsider the awarding of contracts for asphalt paving. Motion carried.”

Then at the meeting of November 11, 1908, the following proceedings were had (See page 90 of printed record, being “Exhibit I”):

“Minutes of Meeting of City Council, November 11, 1908.

“Oklahoma City, Okla., November 11, 1908.

“Council met in adjourned session with the following members present: Messrs. Highley, Workman, Helm, Corder, Peshek, McWilliams, McDavie, Land, Byers and Johnston. Mayor being absent, Mont F. Highley, president of the council and acting mayor, presided:

“City attorney, Taylor, gave verbal opinion in regard to motion of Mr. Highley made at meeting of council, November 9, 1908, ‘That the council reconsider action taken at meeting held Nov. 4, 1908, in awarding contracts for asphalt paving.’ His opinion was that any time before the contracts are signed up by the city and the city and the contractor that the council had the right to rescind its action in awarding said contracts. Moved by Mr. McWilliams, seconded by Mr. Helm, that the opinion of the city attorney be received and placed on file. Motion carried. (There being no opinion of the city attorney to place on file, the only

record of such opinion is the statement as above written. Clerk.)

“Judge Burwell appeared before the council and spoke against the motion and Judge Harris spoke in favor of the same.

“Motion was made by Mr. Highley as stated above, carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Johnston, Land. Nays: Messrs. Peshek, McWilliams, McDavie and Byers.

“Moved by Mr. McWilliams, seconded by Mr. Byers, that Judge Burwell be granted permission to address the council. Motion carried.

“Judge Burwell presented the eighteen contracts of David McCormick for paving different streets and demanded that they be accepted by the council.”

Then at this same meeting on the night of November 11, 1908, the Mayor and City Council purported to award the contracts to The Conway Company for the paving of the various streets involved in this case.

The parties to this action have conceded throughout the litigation the validity of all of the proceedings had up to the time of the awarding of the contracts to David McCormick, as shown by recitation on page 78 of printed record, as follows:

“Both parties concede the validity of the proceedings up to the time of the awarding of the contract.”

David McCormick, after the pretended awarding of the contracts to make the improvements on these various streets to The Conway Company by the City of Oklahoma City, filed his bill for injunction and for specific perform-

ance of its part of the contract against the City of Oklahoma City and its officers and against The Conway Company, its officers, employees and agents, to prevent them in any way from interfering with the complainant in making the improvements involved in this case. On the hearing for a temporary injunction, the writ was denied, and it was subsequently agreed that the affidavits filed on that hearing and the testimony taken on that hearing and other affidavits to be filed should be considered by the trial court and given the same force and effect as though the testimony and evidence were taken in the usual and ordinary way under the rules of the United States Circuit Court in such cases. This stipulation appears on pages 75 to 77, inclusive, of printed record. Some of the evidence introduced upon the trial relating to the profits which would have been earned by David McCormick had he been permitted to carry out his contracts was the affidavit made by Foxhall P. McCormick, and it appears on page 175 of the printed record and is as follows:

“FOXHALL P. MCCORMICK, being first duly sworn according to law, deposes and says that he has been in the paving business constantly for twenty years, and has been in the asphalt business for fifteen years; that during a large part of said time he has been in the active management and control of paving contracts and has done the calculating necessary in determining bids to be made, and has also been in control of the contracts that were let for work of this nature, and has also been familiar with the cost necessary to perform work of this kind. That during said time he has done general contracting with asphalt and other

paving materials in Chicago, St. Louis, Kansas City, Topeka, Oklahoma City, Muskogee, San Antonio, Beaumont and Fort Worth, Texas. That he has figured the cost of all the work represented by the bids made by David McCormick, the complainant in the above cause, to the city of Oklahoma City for the paving of certain streets and the doing of certain work in the city of Oklahoma City, as represented and shown by said bids; the advertisement for the work and improvements and of the estimate of the cost of doing such work; the cost of material and the total cost of completing the work and also figuring the difference between the cost of said work and the amount of said bid; and this affiant further states that after paying the total expenses of the work referred to by the several bids involved in this case, there would be a difference between the cost of completing said work pursuant to the plans and specifications and the amount of said bid of at least one hundred thousand dollars (\$100,000), and that the profits, which have been earned by the complainant after performing all of the work and completing the improvement pursuant to and in conformity with the plans, specifications, advertisements, and bids and the acceptance of the same by the City would have been \$100,000.00.

“And further affiant sayeth not.

“FOXHALL P. MCCORMICK.

“Subscribed and sworn to before me this 16th day of January, 1911.

(Seal)

“N. E. DEMOSS, Notary Public.

“My commission expires Oct. 21, 1911.”

Other affidavits were introduced upon the trial as follows:

“EXHIBIT J”—AFFIDAVIT OF R. E. BROWNELL:

R. E. Brownell testified by affidavit under stipulation (see page 72 of printed record) that he was a resident of

Oklahoma City; was for several years president of the Oklahoma Building and Construction Company and at the time of the trial was an independent contractor in Oklahoma City; that he was acquainted with David McCormick; that he was present at the meeting of the City Council on the 4th of November, 1908, when the Mayor and City Council awarded the various contracts involved in this case to David McCormick; that David McCormick was in the council chambers at that time and during the deliberations of that body; that as president of the Oklahoma Building and Construction Company, he attended many of the meetings of the Council of Oklahoma City when he was interested as a bidder and otherwise in the various bids that were before the Council; that it was the custom of the City Council to give no notice in writing or otherwise to parties to whom its contracts for paving and public work were awarded, and that it was customary for those interested in these meetings to attend the council meetings in order to ascertain whether they were successful bidders or not, and that at no time did affiant ever know of the City of Oklahoma City giving any written or formal notice of the award of any contract.

“EXHIBIT K”—AFFIDAVIT OF WILLIAM W. ROBINSON:

(See page 73 of printed record.) William W. Robinson testified by affidavit that he was a resident of Oklahoma City and was employed at the time as District Superintendent for the Cleveland-Trinidad Paving Company and

was so employed on the 4th day of November, 1908; that he was at the City Council chambers of Oklahoma City upon that date when the various contracts for paving in Oklahoma City were awarded by the City Council to the various paving companies, and was present when the various awards were made to David McCormick at that time; that he was acquainted with David McCormick and George King, who was at the time Superintendent for David McCormick; that David McCormick and George King were both in the council chambers during the deliberations of the council at the time the awards were made to David McCormick; that the affiant was Superintendent for the Barber Asphalt Paving Company and did the first paving for the City of Oklahoma City in 1902-3-4; that that company did work in the business section of Oklahoma City amounting to something near \$700,000; that he had charge of the work and that at no time was it the custom of Oklahoma City to notify the paving company that his company had received the award of any contract, but that at all times it was the custom of the representatives of the paving company to attend the council meetings and learn for themselves who received the award of the various contracts; that it had never been the custom of the City of Oklahoma City to notify any of the public contractors that they were awarded any contracts; that it has been the custom for the various paving contractors as well as the other contractors to ascertain for themselves who received



the award for the various work which was to be done by attending the council meetings, or from the clerk or from some other source upon their own initiative

“EXHIBIT L”—AFFIDAVIT OF DAVID MCCORMICK:

(See page 74 of printed record.) David McCormick testified in his own behalf by affidavit that he was a resident of St. Louis, Missouri, and plaintiff (complainant) in this case; that he was present at the meeting of the city council upon the 4th day of November, 1908, when the city council awarded the various contracts to him involved in this litigation; that the city council referred to is the city council of Oklahoma City which met in the council chambers of the city upon the date aforesaid; that the city council of Oklahoma City at that time and place and in the presence of himself, awarded the eighteen contracts mentioned in his bill to him; that he is president of the Parker Washington Company; that that company has heretofore contracted with the City of Oklahoma City for paving, in an amount to exceed \$250,000.00; that the affiant had the active charge of the negotiations with the City as president and general manager of that company, and at no time did the City of Oklahoma City ever give notice in writing or otherwise that the bids were awarded to the Parker Washington Company, but that the company invariably attended the meetings of the city council when such bids were passed upon and contracts awarded; that it learned of the awards by being present at the deliberations of the council and hearing same; that it was the custom of the City of

Oklahoma City to award contracts to the various public contractors without ever giving any formal notice of such award to the successful bidder; that at no time did either the company of which he was president or himself ever receive any formal written notice or any other notice except the notice which they obtained by being present at the meeting and ascertaining the action of the council thereon; that it was not the custom of the City of Oklahoma to give any formal notice to the various contractors to whom contracts were awarded, but that it was the custom of the contractors to ascertain for themselves as to whom such contracts had been awarded.

“EXHIBIT M”—AFFIDAVIT OF DAVID MCCORMICK:

(See page 75 of printed record.) David McCormick also testified by affidavit as follows: That at the time he filed his bid for the paving of the streets and the making of the improvements referred to in his bill of complaint; at the time the award was made by the council to him for the doing of the work and for the making of the improvements involved in this action, and at all times since the filing of his bid he had been financially able to make the improvements involved in this action, and that he had at all times been willing to comply with the resolutions of the City and the terms of his bid and the award of the work and improvements and that he had at all times been able, ready and willing to make such improvements pursuant to the plans and specifications upon which his bid

was made; that he was at the time of the making of the affidavit and had at all times ever since the filing of his bid for the improvements been financially responsible and financially able to make the improvements under the terms and conditions prescribed by the City of Oklahoma City, and under the terms and conditions provided by the City of Oklahoma for the doing of the work and the making of the improvements; that he would have made the improvements and completed the same but for the action of the mayor and city council and other officers of the City of Oklahoma City in failing to carry out their part of the contract with reference to the improvements with the affiant, and but for their interference with him and his employes and those associated with him in pretending to award a pretended contract for the making of such improvements to The Conway Company, and in failing to furnish him (affiant) with the necessary data, grading stakes, and other necessary information which would enable him to complete the work; that affiant's failure to make the improvements was due entirely to the fault of the City of Oklahoma City and its officers, agents and employes and not to any fault or neglect on the part of the complainant, and that the complainant was prevented from making the improvements by reason of the conduct of the City of Oklahoma City, its officers, agents and employes and not by reason of any fault on the part of the complainant.

On the hearing for temporary injunction, the testimony was taken of various witnesses, which was by stipulation

filed in the case to be considered on the final trial and it was so considered, and we wish to direct the Court's attention to some of this testimony.

W. C. Burke, the City Engineer of Oklahoma City, testified as shown on pages 105 to 107, inclusive, of the printed record, as follows:

“Q. At the time these contracts were awarded to David McCormick by the city council, he had all appliances and machinery here to go ahead and do this work, didn't he?

A. No, sir.

Q. Didn't he have an asphalt plant?

A. Yes, sir. He had an asphalt plant.

Q. He had other machinery here?

A. No, sir.

Q. Didn't he have shovels?

A. He might have had a few shovels or picks.

Q. And tools, picks, all that sort of things?

A. No, sir. I say he didn't have them here. He finished the 8th Street paving in October and he had to borrow some tools in order to finish that.

Q. At the time these contracts were awarded to David McCormick, isn't it a fact he had more machinery and plants here to do that work than the Conway Company people had?

A. The Conway people didn't have any at that time.

Q. None at that time?

A. No, sir.

Q. Didn't have until after this whole matter was disposed of by the city council?

A. No.

- Q. Didn't have until after suit was filed in the District Court to enjoin them from doing that work?
- A. It was some time about the first of December, when they got their outfit here; that is, all their appliances that go with the paving work.
- Q. You remember the meeting of the city council at which Mr. Burwell appeared and addressed the city council, protesting against the reconsidering of the David McCormick award, do you not?
- A. Yes, sir.
- Q. At that time, Mr. McCarthy, the manager of the Conway people was present?
- A. Yes, sir.
- Q. He knew all about the claim of Mr. McCormick that he had a contract for the paving of these streets?
- Mr. Paul: Objected to as incompetent, irrelevant, immaterial, asking for conclusion; the record is the best evidence.
- The Court: Sustained.
- Q. Isn't it a fact that Mr. McCarthy was present in the council chamber that evening and heard all these proceedings?
- A. He was in the council room that evening, whether he was there at that particular time when you addressed the council I could not say for certain.
- Q. He was there about the council chamber all evening?
- A. Yes, sir.
- Q. Would it have been possible for him to have been in and out of the council chamber that evening and not have known this matter was being considered?
- Mr. Paul: Objected to as incompetent, immaterial.

The Court: Overruled.

- A. That is rather a hard question to ask. I was there, very busy at the time; I could not tell who was in the council chamber.
- Q. I asked the question if it would have been possible for him to be in and out of that council chamber that evening and not know this matter was being considered there?
- A. I don't think there was any question but what he knew there was a controversy about this paving, and you addressed the council, I don't think there could be any question about that.
- Q. I was claiming the award was to David McCormick?
- A. Yes, sir.
- Q. During that time and before the award was made to David McCormick was reconsidered by the council, did you talk with Mr. McCarthy about it?
- A. Yes, sir, I talked to everybody; talked to Mr. McCormick, Mr. King, Mr. McCarthy, Mr. Bell.
- Q. Did you talk with Mr. McCarthy as to whether the award to Mr. McCormick constituted a contract for that work?

Mr. Paul: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled; exception noted by defendant.

- A. I don't know that I did, I have no recollection of it.
- Q. You say you were present in the council chamber when Mr. Burwell addressed the council; he appeared there on two different occasions, didn't he?
- A. I believe he did.
- Q. Did you hear Mr. Burwell state to the mayor and the council or the president of the council as the

case might be, whoever was in charge of the city council—the city council was in regular session at that time, was it not?

A. Yes, sir.

Q. Did you hear Mr. Burwell state to the mayor and council on that occasion that he had there eighteen contracts for these particular improvements and demanded that they be executed by the mayor on behalf of the city and the proper officers of the city, and if they were not in form, they would make them complete and file plans and specifications if they were awarded the contracts by the council?

Mr. Paul: We object to that as incompetent, irrelevant and immaterial; the record is the best evidence.

The Court: Overruled.

A. I don't remember, I think you did though.

Q. I will ask you to refresh your memory and see if you don't remember that?

A. There was so much said and occupied so much time there, it is pretty hard to remember what was said. It seems to me I have a vague recollection you did mention about having the contracts ready to tender and asked that they be executed.

Q. Didn't Mr. Burwell on that occasion or on a subsequent occasion state to the mayor and council that Mr. McCormick would insist on these awards and would take such legal measures as would be necessary to protect his interest?

A. Yes, sir; I heard that.

Q. That occurred while the council was in regular session?

A. Yes, sir."



John J. McCarthy, the representative of the Conway Company, as shown by pages 112 and 113, inclusive, of printed record, among other things, testified as follows:

“Q. At the time of awarding these contracts you were here in person?

A. Yes, sir.

Q. You were here when the award was first made to David McCormick?

A. I was.

Q. For all this work you knew that the city council had awarded the paving for all these eighteen streets to David McCormick?

A. I did.

Q. After the award was made to David McCormick you for the Conway Company drew down your certified checks for sixteen of these same streets?

A. I don't think that is the fact.

Q. Isn't it a fact that the Conway Company checks were drawn off, the certified checks?

A. Might have been, I don't remember.

Q. Have you the information either with you or at your command, whereby you could determine that?

A. No.

Q. Could you ascertain at your office?

A. I can.

Q. I wish you would ascertain. After motion was made in the city council to reconsider the David McCormick award, you employed counsel to appear before the city council to urge the reconsideration of that bid, didn't you?

Mr. Paul: Objected to as incompetent, immaterial.

The Court: Overruled, exception noted by complainant.

- A. *We employed counsel to assist the city attorney to see whether that thing could be done or not.*
- Q. Wasn't it part of the employment of that attorney that he should appear before the city council to address the council and urge the reconsideration of that bid?
- A. Instruct the council on the law in regard to it.
- Q. You were not interested in reopening that subject except insofar as it might bring about a reconsideration of the award, were you?
- A. That is right.
- Q. You hoped to profit by a reconsideration of the award?
- A. I expected to.
- Q. Looking at that matter you employed Mr. Harris to appear before the city council and address the city council and advise them to reconsider the award to David McCormick for these eighteen contracts and that they had a right to reconsider it?
- A. I employed him to assist, as I said before, Mr. Taylor, in regard to the law.
- Q. You employed him because he had expressed to you that the city council had the right to reconsider the bid?
- A. Yes, sir; he did express it to me.
- Q. He did express it to you in that way?
- A. Yes, sir.
- Q. With the object in view and in the hope that the city council might be induced to reconsider the award you employed him to appear before the city council?

Mr. Paul: Objected to as incompetent, immaterial.

The Court: Overruled.

A. I had several opinions on that.

Q. I am asking you about the proposition of employing Mr. Harris. That is true, isn't it?

A. That is true.

Q. When motion came up for reconsideration of awards in the city council you were personally present?

A. I was.

Q. You heard all the proceedings there that evening?

A. I did.

Q. You were present when Mr. Burwell asked permission of the city council to be heard upon the question as to whether or not the council had a right to reconsider those awards?

A. Yes, sir.

George Hess, City Clerk of Oklahoma (see pages 119 and 120 of printed record), testified as follows:

*Cross examination by Mr. Burwell.*

“Q. Mr. Hess, how many contracts do you say have been let for public improvements since you have been city clerk?

A. I say, I don't know exactly.

Q. Well, approximately?

A. I said there were over one hundred.

Q. Did you ever send to any of these contractors any written notice that the contracts had been awarded to them?

A. No, sir.

Q. You have no record in your office showing the adoption of any particular rule of the council which sets out the rules that were actually adopted?

A. That is the only one I have been able to find.

Q. That is only a record that certain rules were adopted; you have nothing in your office to show what they were?

A. Not now, that I can find.

Q. You were present in the city council chamber on the evening Mr. Burwell appeared there and spoke to the council urging the council not to reconsider this award to David McCormick for these various contracts?

A. Yes, sir.

Q. Did you hear Mr. Burwell make the statement to the council at that (\* \* \*) while they were in session that Mr. McCormick would insist upon the awards that had been made to him and if necessary would take such legal steps as were necessary to protect his interests?

Mr. Chambers: We object as incompetent, irrelevant, immaterial and not proper cross examination.

The Court: Overruled; exception noted by defendants.

A. I did.

Q. Was that statement made before the council reconsidered the motion or considered the motion to reconsider these awards to David McCormick?

A. The motion was up for consideration. It had not been voted on yet.

Q. While it was up for consideration Mr. Harris and Mr. Burwell spoke on the motion?

A. Yes, sir.

Q. Addressed the mayor and city council which was then in session?

A. Yes, sir.

Q. It was during the remarks of Mr. Burwell at that time that he made this statement?

A. Yes, sir.

Q. Then after that they reconsidered the matter and attempted to set aside the awards to David McCormick?

A. Yes, sir."

He again testified on further examination (see page 129 of record) as follows:

"Q. I will ask you if after these contracts were awarded by city council if they ever reconsidered any of them and took the contract away from the person to whom it was first awarded?

A. Yes, sir.

Q. How many? I mean during the time you were clerk?

A. There was twenty.

Q. After the award was made?

A. Yes, sir.

Q. To whom were the awards made?

A. Two of them was made to the Cleveland Trinidad Paving Company and eighteen of them made to the Parker Washington Co. or David McCormick.

Q. Then just two outside of the eighteen contracts involved in this case?

A. That is all I remember of.

Q. Those were all involved in the same proceedings of the city council at this particular time, weren't they; the Cleveland Trinidad Paving Co. had two of these contracts and David McCormick had eighteen?

A. Yes, sir."

And again on page 121 of the printed record, he testified as follows:

“Q. Mr. McCormick also filed with you the formal bonds on the blanks that are usually used by the city for that purpose in contracts of this kind, didn't he?

A. Judge, I could not state that, because I never looked at the bonds; the bonds are there for themselves rolled up there; I didn't open them.

Q. David McCormick and the company people and all the other bidders put up certified checks for 3 per cent of the amount of their respective bids, didn't they?

A. Yes, sir.”

David McCormick, the complainant, testified as shown by page 125 of printed record, as follows:

“Q. You say in your bill you had contracted for something like \$35,000 of materials for the construction of these streets?

A. Yes, sir.

Q. With whom did you contract?

A. The O. K. Cement Company.

Q. For how many barrels of cement.

A. The required amount for this contract.

Q. Is that the only contract you made?

A. That is the only contract we entered into in writing; we had figured on other materials for the work.

Q. You had not contracted with anyone?

A. We had not signed up contracts for them.

Q. The O. K. Cement Company have never endeavored to enforce the contract against you, have they?

Mr. Burwell: Objected to as incompetent, irrelevant and immaterial. No defense to this action.

The Court: Sustained.

Q. Who represents the O. K. Cement Company?

A. Mr. Harter.

Q. Was it not understood between you and Mr. Harter at the time you purchased this cement that it was upon condition that the contracts should be eventually awarded to you by the city?

A. It was not."

The formal contracts which were presented by David McCormick, through his attorney, Mr. Burwell, to the mayor and city council with the demand that they execute them, were all in the same language except as to the description of the streets and the price to be paid; they were duly executed by McCormick and a copy of the form of these contracts appears at pages 160 to 165 of the printed record. This presentation of these contracts and the demand for the execution of them was made while the mayor and city council were in session and before there was any vote attempting to rescind the awards made to Mr. McCormick.

It will also be observed that Mr. McCormick at all times offered to do and perform everything required by the city in the carrying out of its contracts as evidenced by these awards.

From the final decree entered by the Circuit Court of the United States and which was affirmed by the Circuit Court of Appeals of the Eighth Circuit, the complainant prosecuted his appeal to this court and assigned the following errors:



## ASSIGNMENTS OF ERROR

The appellant in the above entitled cause, in connection with his petition for appeal herein, presents and files therewith his assignments of error, as to which matters and things he says that the decree entered herein on the 22nd day of February, 1913, is erroneous, to-wit:

**FIRST:** Because the court committed error in dismissing plaintiff's appeal upon the evidence and pleadings.

**SECOND:** Because the court committed error in holding that all the evidence in this cause, taken in connection with the allegations of the bill and of the answer, did not prove a contract between the plaintiff and defendant, City of Oklahoma City, and its officers, for the construction of the pavement and improvements set out in the bill.

**THIRD:** Because the court erred in holding on the evidence and allegations of the bill and answer that the contracts set out in the bill of complaint between plaintiff and the City of Oklahoma City, and its officers, were not completed and binding contracts, and further, in holding that in order to make a contract between the plaintiff and defendants which would be binding upon the City of Oklahoma City, it was necessary, in addition to the resolutions and ordinances of the city, notices and acts of the parties, plans, profiles and specifications, which were introduced in evidence, and bids and awards, that a formal written contract should be executed by the parties.

**FOURTH:** Because the court erred in holding that under the pleadings and evidence in this case the defendants were not estopped from denying the validity of the awards made to the plaintiff for laying the pavement and improvements set out in the bill of complaint, and in holding that under the evidence in this case that the defendants could repudiate the contracts, and decline to execute the formal written contracts, as evidenced by the resolutions, published notices, bids, plans, profiles, specifications, notices and awards, and acts of the city council, for the construction of the improvements set out in the bill of complaint.

**FIFTH:** Because the court erred in holding that under the evidence and pleadings in this case that in equity the defendants would be allowed to take advantage of the non-existence of the formal written contracts by them; the same being intended only to embrace the matters and things set out in full in the writings, ordinances, resolutions, published notices, bids and awards, plans, profiles and specifications in evidence in this case, and as set forth in the complainant's bill of complaint.

**SIXTH:** Because the court erred in not holding that under the evidence in this case, by which it appeared that the defendant city, and defendants, had prevented this complainant from carrying out and performing the construction of the pavement and improvements set out in the bill, that the complainant was entitled to introduce evidence as to the measure of his damages by such wrongful acts of the defendants, and in not assessing such damages as evi-

denced that the complainant had suffered by reason of such wrongful acts of the defendants in preventing the complainant from carrying out and performing his contracts.

SEVENTH: Because the court erred in holding that there was not a completed contract between the plaintiff and defendants at the time the awards were made by the city council of the City of Oklahoma City, on the bids submitted by the plaintiff for constructing the pavement and other improvements set out in the bill, and the court further erred in holding that any additional contract was necessary between the parties after the formal acceptance of the bids submitted by the plaintiff, as set up in the pleadings, and the awarding of the contracts to him by the City of Oklahoma City, as shown in the pleadings and evidence herein.

EIGHTH: Because the court erred in holding that there was no completed contract between the complainant and the City of Oklahoma City, it having been provided in the specifications that a formal written contract should be subsequently executed by the respective parties.

NINTH: Because the court erred in holding that the action of the City of Oklahoma City by its resolution revoking the awards made to the complainant for the paving and other improvements set out in the bill of complaint, did not impair the obligations of the contracts between the complainant and the city, and was not in violation of the

constitution of the United States, wherein it is provided that no state shall pass any law violating the obligation of a contract, and the court erred in not holding that the taking away from the complainant by the resolution of the City of Oklahoma City of the awards theretofore made to him by said city for doing the paving and improvements set out in the bill, deprived the complainant of his property without due process of law, in violation of the constitution of the United States.

**TENTH:** Because the court erred in not reversing the judgment of the Circuit Court of the Western District of Oklahoma in the matters and particulars above set out, and in not remanding said cause to the District Court of the United States for the Western District of Oklahoma with directions to assess such damages as the complainant may have sustained by reason of the act of the City of Oklahoma City in depriving complainant of the profits and rights under his contracts.

## PROPOSITIONS OF LAW

Under the record in this case and the assignments of error we suggest and present in our brief the following propositions of law:

FIRST: The powers of the mayor and city council are twofold. First: They act in their governmental powers, that is in the exercise of those powers which are necessary to be exercised in governing the city, such as the passing of ordinances and all other acts incident to the governing of a city as a subordinate part of the state; and, second: They act under their contractual powers which are incident to the management of the city, such as the making of contracts, and the doing and performing of those matters and things which may properly be termed business transactions. In the exercise of their governmental powers, they cannot do any act which will be irrevokably binding upon their own future course, or bind their successors in office, but in their business relations as a municipality they are bound by the same rules as an individual.

SECOND: We insist that the passing of the resolution by the mayor and city council for the paving of the streets in controversy, which resolution was published, the passage of the resolution directing the city engineer to prepare plans and specifications and directing the city clerk to give the notice provided for by statute to prospective bidders, the preparing of these plans, profiles, plats and specifications by the city engineer, the giving of the notice, provided for

by the city clerk, the filing of the bids by David McCormick for the streets involved in this suit, and the accepting of the bids filed by McCormick and the awarding of the contracts to him for the streets in controversy, constituted a valid and binding contract upon the city from the moment of the award.

**THIRD:** That the Mayor and City Council of Oklahoma City had no power or authority in law to reconsider the awards made to David McCormick for the improvement of the streets in controversy and had no power to again award the contracts for the making of these improvements to the Conway Company.

**FOURTH:** The mere fact that the specifications prepared by the city engineer and the notice published by the city clerk inviting bids by contractors, indicated that the parties to whom the contracts were awarded should sign a formal written contract, did not in any way relieve the award made by the mayor and city council from the force and effect of a completed and binding contract for the making of such improvements. The contract was complete and binding from the moment the award was made and even if the notice provided for a more formal written contract, that would merely be a re-statement in a more formal way of the contract already entered into, and each of the parties were bound by the terms of the award and that which preceded it from the moment the award was made.

**FIFTH:** If the defendants have made it impossible

during the pendency of the suit and before trial, for equity to grant the relief prayed for in the bill, the court should assess against the defendants the damages sustained by the plaintiff.

SIXTH: The evidence clearly established that the damages sustained by Mr. McCormick was \$100,000; that the profits which he would have received if he had been permitted to carry out the contracts would have been that sum; that the difference between the contract price—that is, the amount of his bid and the cost of making the improvements—was \$100,000.

SEVENTH: There was no provision of law for the giving of notice of the award of the contract to contractors, and as shown by the evidence, it was the universal custom not to give such notice.

EIGHTH: Under the record in this case the court still has power to grant equitable relief which falls within the facts pleaded and the prayer of the bill, by decreeing that David McCormick be paid the amount of damages sustained from the proceeds of the bonds issued on the property abutting the streets improved, but if this cannot be done, then we insist that the court should retain the bill, determine the amount of damages sustained and render judgment therefor. And it is unnecessary to remand the case for a new trial, because the amount of damages sustained by McCormick is shown by the record before this court, and



the damages he sustained as shown by the evidence were \$100,000.00.

NINTH: The formal contract used by the City and which was formally executed by McCormick and presented to the city for execution by it, contained no substantial provisions or conditions which were not embodied in the contract already entered into between the city and David McCormick by virtue of the plans, profiles, specifications, resolutions, notices, bids and awards, and hence the formal written contract to be signed by the city and David McCormick would in no way change or modify the contract already evidenced by writings.

## ARGUMENT

### Power of Mayor and City Council Twofold.

FIRST PROPOSITION: *The power of the mayor and city council are twofold, 1st: They act in their governmental powers, that is in the exercise of those powers which are necessary to be exercised in governing the city, such as the passing of ordinances and all other acts incident to the governing of a city as a subordinate part of the state; and 2nd: They act under their contractual powers which are incident to the management of the city, such as the making of contracts, and the doing and performing of those matters and things which may properly be termed business transactions. In the exercise of their governmental powers, they cannot do any act which will be irrevocably binding upon their own future course, or bind their successors in office, but in their business relations as a municipality they are bound by the same rules as an individual.*

A number of questions have been presented both in the trial court and the Circuit Court of Appeals. All of the controverted questions, as we view the record, which were passed upon by the Circuit Court of Appeals, were determined in favor of the appellant, except the one question as to whether or not the awarding of the work to David McCormick constituted a valid and binding contract. This question was decided against the appellant by the Circuit Court of Appeals and we wish to say here that this is the controlling question in this action.

It became material under the contention of the appellees to state our position with reference to the capacity in which the mayor and city council were acting at the time they awarded these contracts. The appellees have insisted that under certain rules of the city council it had the right to reconsider the awards made to David McCormick, and our position has been throughout the litigation that those rules applied only in matters where the mayor and city council were acting in a legislative capacity, but in the awarding of these contracts or any other similar contracts the mayor and city council act in their business capacity and not in their legislative capacity.

Upon this point the Circuit Court of Appeals said (see 203 Federal Reporter, page 926): "The appellant has argued at length upon the distinction between the governmental or public functions of a city and its property and business powers. This distinction was pointed out with care by this Court in *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Federal 271, 22 C. C. A. 171, 34 L. R. A. 518, and it will be conceded for the purposes of this case that in awarding these contracts the City of Oklahoma City was acting in the exercise of its business powers."

As what we had to say in our brief in the Circuit Court of Appeals and the citations of authorities upon this point cover but a few pages, we desire to repeat them here to the end that the Court may have our full view upon this subject.

The powers of the mayor and city council of a city are twofold. First, the governmental powers—that is, those powers necessary to be exercised in the governing of the city, such as the passing of ordinances and all other acts incident to the governing of a city as a subordinate part of the state itself and of the federal government; and, second, all of those powers which are incident to the business management of the city, such as the making of contracts and the doing and performing of all of those matters and things which may properly be termed business transactions.

As to the former powers—that is, the powers of governing—one set of officers cannot bind their successors. Their successors have the same power to repeal an ordinance that the incumbents have to enact it, and an officer of the city may do any act falling within the governmental powers which are necessary to the due and proper exercise of its police powers and regulations, and these officers have the right to change or modify those ordinances or regulations as the exigencies or conditions may require. But as to business contracts, it has been said by high authorities that a city is bound by its contracts the same as an individual, and this rule has been most positively laid down by the Circuit Court of Appeals for the Eighth Circuit in the case of *Illinois Trust & Savings Bank v. The City of Arkansas City*, reported in 76 Fed., page 271. In this opinion, which was written by Judge Sanburn and concurred in by Judges Caldwell and Thayer, in discussing these

powers of municipalities and referring to the particular contract in controversy in that case, it is said:

“But it is insisted that this contract is beyond the powers of this city and void because it grants the right to use the streets of the city to a water company and promises to pay rental for the hydrants for twenty-one years. The proposition on which this contention rests is that the members of the city council are trustees for the public; that they exercise legislative powers; and that they can make no grant and conclude no contract which will bind the city beyond the terms of their offices because such action would circumscribe the legislative powers of their successors, and deprive them of the right to their unrestricted exercise as the exigencies of the times might demand. There are two reasons why this proposition cannot be successfully maintained in this case:

“First—It ignores the settled distinction between the governmental or public, and the proprietary or business, powers of a municipality, and erroneously seeks to apply to the exercise of the latter a rule which is only applicable to the exercise of the former. A city has two classes of powers, the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, *quasi* private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way and in their exercise it is to be governed by the same rules that govern a private individual or corporation.”

In support of this rule, the following authorities are cited:

Dill. Mun. Cor. (3rd Ed.) Sec. 66, and cases cited in the note: *Safety Insulated Wire & Cable Co. v. City of Baltimore*, 13 C. C. A. 375, 377, 378, 66 Fed. 140, 143, 144; *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453, 468, 469; *Com. v. City of Philadelphia*, 132 Pa. St. 288, 19 Atl. 136; *New Orleans Gaslight Co. v. City of New Orleans*, 42 La. Ann. 188, 192, 7 So. 559; *Tacoma Hotel Co. v. Tacoma Light & Water Co.* 3 Wash. St. 316, 325, 28 Pac. 516, 519; *Wagner v. City of Rock Island*, 146 Ill. 139, 154, 155, 34 N. E. 545, 548, 549; *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 126, 31 N. E. 573, 577; *City of Indianapolis v. Indianapolis Gaslight & Coke Co.*, 66 Ind. 396, 403; *Read v. Atlantic City*, 49 N. J. Law 558, 9 Atl. 759.

Again in the case of *Willis v. Board of Commissioners of Wyandotte Co., Kansas*, decided by the Circuit Court of Appeals of the Eighth Circuit, 86 Federal 872, the court said:

"It is true, it was beyond the power of the county to make the improvements because the law under which they assumed to act was unconstitutional; yet the county and its officers, the property holders who asked and were compelled to pay for the improvements, and the holders of these certificates, who paid out their money for material and labor to make the improvements all believed, at the time these things were done, that their acts were authorized by law. In making these improvements it cannot be said that the county was exercising its public or governmental powers. It was exercising its proprietary or business powers. It was acting and contracting for the private benefit of itself and its inhabitants, and, in the exercise of this power, it is to be governed by the same rules that govern private individuals and corporations. Illinois Trust &

Sav. Bank v. City of Arkansas City, 40 U. S. App. 277, 22 C. C. A. 171 and 76 Fed. 271; Safety Insulated Wire & Cable Co. v. City of Baltimore, 25 U. S. App. 166, 13 C. C. A. 375, and 66 Fed. 140; City of Cincinnati v. Cameron, 33 Ohio St. 366; Safety Insulated Wire & Cable Co. v. City of Baltimore, 13 C. C. A. 375, 66 Fed. 140."

Again in the case of *Pike's Peak Power Co. v. City of Colorado Springs*, *171 Fed. v.*, the court said:

"A city has two classes of powers, the one legislative, public, governmental, in the exercise of which it acts as a sovereign and governs its people; the other proprietary, *quasi* private, business, conferred upon it for the private advantage of its inhabitants and itself.

"In contracting for the enlargement of its water system, for electric lights for municipal use, and for the use of conduits and poles to carry its wires, a municipality is exercising its proprietary or business powers, is subject to the same rules of law that govern the agreements of private corporations, and its contracts bind its successive sets of officers."

The United States Circuit Court of Appeals for the Fourth Circuit in the case of *Safety Insulated Wire & Cable Co. v. Mayor and City Council of Baltimore*, 66 Fed. 140, considered the dual powers of a municipal corporation, and also the fact that the awarding of the contract pursuant to advertisements and filing of bids, constitutes a valid and binding contract which may be enforced in the courts.

The City of Baltimore owned a system of telegraph and telephone wires carried on poles in the City of Baltimore and which were used exclusively by the city for the



use of the police and fire departments respectively. An ordinance was passed by the mayor and city council authorizing the advertising for bids and the letting of a contract to place wires of the police and fire alarm and telegraph and police patrol systems under ground. The ordinance put the matter in charge of the board of fire commissioners and the superintendent of police and fire alarm telegraph, and authorized and directed them to advertise for proposals to furnish cables, conduits and trenching separately or as a whole when it might be necessary.

The ordinance authorized this committee to award this contract to the lowest responsible bidder or bidders. It appropriated a large sum of money for the doing of the work. The board of fire commissioners and the superintendent of the police and fire alarm telegraph, acting under this ordinance, advertised for bidders to do the work. The Safety Insulated Wire and Cable Company put in a bid for \$97,985.00 and it was accepted on June 28, 1893. On June 30, 1893, two days afterwards, the company declared itself ready to begin and conclude the work. On the same day it was informed that the board of fire commissioners and the superintendent of the police and fire alarm telegraph, by the secretary, that the vote awarding the contract to the Safety Insulated Wire and Cable Company was reconsidered for the reason that the ordinance authorizing the same was defective and void for indefiniteness as declared by the opinion of the city solicitor. The Safety Insulated Wire and Cable Company made no further progress in the

work, but it brought its action in the Circuit Court of the United States for the District of Maryland against the mayor and city council of Baltimore for the breach of the contract. The syllabus of the opinion is as follows:

“Cities and towns, as municipal corporations, possess a double character, the one governmental, legislative, or public; the other proprietary or private. In the former such a corporation is made by the state one of its instruments for the exercise of certain political powers, which cannot be controlled or embarrassed by any contract of the corporation; but in its proprietary or private character powers are conferred for the private advantage of the particular corporation, and, as to such powers, and contracts made thereunder, such corporations are to be regarded as private corporations.

“In the exercise of its governmental powers, a municipal corporation has a discretion as to the time and manner of making improvements, etc., but when such discretion has been exercised the duty becomes purely ministerial, and contracts made in reference to the carrying out of such improvements, etc., cannot be revoked at the will of such corporation.

“The city of B. passed an ordinance directing certain officials to advertise for proposals for furnishing cables, conduits, etc., and placing the police and fire alarm telegraph wires belonging to the city underground, and after deciding upon the best cables, etc., to award a contract for furnishing the same and doing the work. Said officials, after due advertisement, accept the proposal of the S. Co. That company, two days later, declared itself ready to begin work, but on the same day was notified that the acceptance of its proposal had been reconsidered because of an opinion of the city solicitor that the ordinance authorizing it was defective in certain matters of detail. *Held*, that such attempted revocation of the assent of the city was no defense to an action by the S. Co. on the contract.”

In this case it will be observed that the awarding of the contract for the doing of the work concluded the negotiations and this award, with the advertisement for bids and the filing of the bid by the party to whom the contract was awarded, constituted a valid contract in writing between the City of Baltimore and the party to whom the work was awarded.

Likewise in the case at bar the city, having advertised for bids, furnished plans and specifications on which these bids were made, and awarded the contracts to David McCormick; all of these taken together constituted written contracts which were binding upon the city as well as upon McCormick.

The learned court discussing further the powers of a municipality said:

“The assignment of error relied upon by appellant is the third. The court was in error in not discriminating between the acts of the municipal corporation when acting in its governmental capacity and when acting as a property holder, and putting contracts made in these different capacities upon the same level of liability for non-performance. That this contract was made by the corporation through its lawful agents, and within the scope of its powers, is not denied. The position taken by the defendant is that the city council in passing this ordinance advertising for bids, accepting this bid, and engaging in this work, acted in its governmental capacity, and that no contract so made is revokable. It seems to be a contradiction in terms to speak of a contract revokable at the will of one of the contracting parties. Be this as it may, municipal corporations, confining the terms to cities and towns, possess a double character, the one governmental, legis-

lative, or public; the other in a sense proprietary or private. In its governmental or public character, the corporation is made by the state one of its instruments, the local depository of certain limited and prescribed political powers to be exercised for the public good on behalf of the state, and not for itself. These legislative or governmental powers they cannot cede away or control or embarrass by any contract disabling them from performing their public duties. *Western Saving Fund Soc. v. City of Philadelphia*, 31 Pa. St. 182. Such contracts necessarily are void *ab initio*. They are not within the scope of the powers of the corporation. But in its proprietary or private character the powers are conferred on the municipal corporation, not from considerations connected with the government of the state at large, but for the private advantage of the particular corporation as a distinct legal personality. As to such powers, and as to the property acquired thereunder and contracts made with reference thereto, the corporation is to be regarded *quoad hoc* a private corporation. Judge Dillon, in whose valuable work on municipal corporations these principles are discussed, further illustrates the peculiar character of these municipal bodies in these words:

“‘One reason given for the distinction (between municipal and *quasi* corporations) is that, with respect to local or municipal powers proper (as distinguished from those conferred on the municipality as a mere agent of the state), the inhabitants are to be regarded as having been clothed with them at their request, and for their peculiar and special advantage, and that as to such powers and the duties springing out of them the corporation has a private character and is liable on the like principles and generally to the same extent as a private corporation.’ Dill. Mun. Corp. Sec. 26.

“‘The City of Baltimore owned certain telegraph and telephone lines, giving greater efficiency and convenience to its police and fire departments. They were above ground, on poles. They were liable to constant injury and interruption from fires, gales and other

causes. For their better preservation, the city determined to put them under ground in conduits, and make this contract for that purpose. The contract was for the private advantage of the city as a legal personality, distinct from considerations connected with the government of the state at large; and with reference to this contract the city must be regarded *quoad hoc* a private corporation.

“There is another point of view. In its governmental or legislative capacity a municipal corporation is invested with discretionary powers. It has a discretion as to the time and manner of making corporate improvements, grading streets, making sewers, drains, vaults, etc. The courts cannot control this discretion.

“But when this discretion has been exercised, and the public improvements determined upon, and a contract made relative thereto, the legislative function has been exhausted, and the duty has become purely ministerial. Dill. Mun. Corp. Sec. 949; *Weightman v. Washington*, 1 Black 49. *But, apart from and above all this, the obligation of a contract made between parties competent to contract cannot be impaired at the option of one of the contracting parties. This doctrine controls whether the party to the contract be a sovereign state or an humble individual.* It has been enforced against the action of states, when the subject matter of the contract was the exercise of the highest governmental and legislative powers, the granting of a franchise. It was perpetuated an exemption from the power of taxation when such exemption has been the consideration for the contract between the sovereign and the citizen. And municipal corporations, mere creatures and agents of the sovereign, are not exempted from the operation of the rule.

“Upon authorized contracts within the scope of the charter powers of the corporation, and duly made by the proper officers and agents, they are liable in the same manner and to the same extent as private corporations. Dill. Mun. Corp. Sec. 935. It is true that

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when, in the contract entered into it appears that its execution will interfere with the duties of the municipal corporation in preserving the public health and morals of the city, or will create a nuisance, the corporation can refuse to go on with the contract. *Brick Presbyterian Church v. City of New York*, 5 Cow. 540. Even, however, in that case it must reimburse the contractor for all outlay made under the contract (*Rittenhouse v. Mayor, etc., of Baltimore*, 25 Md. 336) and for all damages not speculative or too remote (*Masterson v. Mayor*, 7 Hill 62; *U. S. v. Behan*, 110 U. S. 344, 4 Sup. Ct. 81)."

This case again came before the Circuit Court for the Fourth Circuit, and is reported in 74 Federal at page 363. In this later opinion, however, the plaintiff was denied any relief because the contract which was entered into was found by the Circuit Court to be *ultra vires* on the part of the plaintiff below. That is, it was incorporated for the purpose of manufacturing and not for the purpose of laying conduits and building telegraph and telephone lines. However, the acts set forth in the bill were recognized by the court all the way through the litigation as constituting a contract, but because the work undertaken was beyond the powers conferred upon the plaintiff corporation, it was denied any relief.

### Completed Contract.

SECOND PROPOSITION: *We insist that the passing of the resolution by the mayor and city council for the paving of the streets in controversy, which resolution was published, the passage of the resolution directing the city engineer*

*to prepare plans and specifications and directing the city clerk to give the notice provided for by statute to prospective bidders, the preparing of these plans, profiles, plats and specifications by the city engineer, the giving of the notice provided for by the city clerk, the filing of the bids by David McCormick for the streets involved in this suit, and the accepting of the bids filed by McCormick and the awarding of the contracts to him for the streets in controversy, constituted a valid and binding contract upon the city from the moment of the award.*

It will be observed from the statement of facts set forth in this brief that the mayor and city council passed the necessary resolutions to pave the streets in controversy and also directed the city engineer to prepare the plans and specifications for the construction of the work, directed the city clerk to advertise for bids, the bids were filed pursuant to this published notice by the city clerk and within the time provided by the mayor and city council, and thereafter in due and regular session the mayor and city council examined the various bids, adopted the resolution for the ten-year maintenance guaranty and awarded the contracts for the paving of the streets in controversy to David McCormick.

We insist that when these bids were accepted by the mayor and city council and the contract awarded to David McCormick, that that act on behalf of the mayor and city council in connection with those things which preceded,



constituted a valid and binding contract between the City of Oklahoma City and David McCormick for the paving of the streets in controversy.

In the Encyc. of Law & Procedure, Vol. 28, page 1032, under the heading of municipal corporations, the author says:

“When the lowest bid has been accepted, the city is under legal obligations to execute a contract with the bidder, unless the ordinance upon which proceedings were based is invalid; and, after the acceptance of the bid, conditions may not be inserted in the contract which were not contained in the advertisements for proposals.” \* \* \*

We wish to call the attention of the court to the case of *Ft. Madison v. Moore et al.*, decided by the Supreme Court of Iowa on October 21, 1899, reported in 80 N. W. 527. The statement of the case is as follows:

“This is an action upon bond given to secure the faithful performance of a contract with the city for work for which the defendant Moore and Lane were contractors. The other defendants were sureties. It is claimed that there was a breach of the conditions of the obligation and damages are sought in this proceeding therefor. Plaintiff's claims were put in issue and counterclaims were pleaded by the principal defendants. From the verdict and judgment in plaintiff's favor, defendants Moore and Lane appealed.”

One of the questions involved in that case was as to whether or not where a city advertises for bids for public work and bids are received and the same are accepted and the contract awarded to a particular bidder, such trans-

actions constitute a valid and binding contract without a formal written contract in one instrument duly executed by the city on the one hand and the parties bidding on the other. The court said:

"Where the work to be done is fully described in specifications referred to in the advertisement for bids by the city, an acceptance of the bid in writing entered of record, constitutes a contract for the performance of which a bond may be given."

In the case of *Carskaddon v. City of South Bend et al.* (Ind.), 39 N. E. 667, the Supreme Court of Indiana had occasion to consider the question as to whether or not a resolution by the mayor and city council of a city directing one of its members to negotiate and purchase a certain piece of land, together with the oral acceptance on behalf of the party owning the land, constituted a binding contract against the city. The suit was brought by the purchaser for the purpose of recovering the alleged purchase price. The court, however, held that under the statute of that state the alleged contract would be void because prohibited by the statute of frauds, the statute of that state providing that all contracts for the purchase or sale of real estate must be in writing and there was no written acceptance.

The clear inference deducible from the reading of this opinion is that if the owner of the land had offered to sell to the city for a fixed price and on terms satisfactory to the mayor and city council, and the mayor and city council

had unequivocally accepted that offer, that it would constitute a binding contract.

In the case of *Ross v. Stackhouse* (Ind.), 16 N. E. 501, the Supreme Court of Indiana considered the question as to when a contract for public work is consummated, where it is let by the calling for bids and the awarding of the contract. In that case the city had advertised for bids for the improvements and the award was made letting the contract. Subsequently a property owner appealed from the assessment, contending that the alleged contract was void. In this case the court makes a clear distinction between an act by the mayor and city council in the enactment of its ordinances in the discharge of its duties as a municipality—that is, as a lawmaking body for the government of a municipality, and a resolution or act of the mayor and city council in its contractual relation—that is, in entering into a contract for the making of public improvements for the city.

Mr. Chief Justice Mitchell in discussing these questions used the following language:

“It is settled that where the act or decision of the common council or other similar body is done or made in pursuance of notice which the law requires and is in its nature such as to adjudicate or determine or affect the substantial personal or property rights of those notified, a decision once rendered cannot ordinarily be rescinded or set aside. *City of Madison v. Smith*, 83 Ind. 502. This rule has no application, however, to matters of a merely administrative or legislative character. Bodies having cognizance of such sub-

jects may modify, repeal, or reconsider their actions in regard to matters of that nature at any time provided the vested rights of others are not thereby affected. Over such matters they exercise a continuing power. *Welch v. Bowen*, 103 Ind. 252, 2 N. E. Rep. 722; *Board, etc., v. Fuller*, 111 Ind. 110, 12 N. E. 298.

“The purpose of requiring the letting of contracts for street improvements to be advertised is to secure fair competition and to enable the common council to let the contract upon the most advantageous terms. First *Dillon on Municipal Corporations*, Sec. 468. The advertisement is not to give notice to the property holders, nor does the letting of the contract adjudicate upon or determine in any degree their personal or property rights. The matter of accepting or rejecting bids, and of letting the contract, is purely administrative in character, depending entirely upon the discretion of the common council. *Platter v. Board*, 103 Ind. 360, 2 N. E. Rep. 544. The right to reconsider measured, in pursuance of rules adopted for its government, inheres in every body possessed of legislative power; and unless such right be exercised unreasonably and for a fraudulent purpose, to the injury of the complaining party, courts cannot interfere. It does not appear but that the council in reconsidering its previous vote, proceeded in strict conformity to its rules; and, as no rights had attached, we can perceive no sufficient reason for holding its proceedings void. \* \* \* \* The rejection of the bids and the reconsideration of its vote by the common council were facts which occurred prior to the making of the contract. After work has been done, the contract cannot be overthrown by going back and appealing to these facts.”

In the case at bar every requirement of the law pertaining to the things precedent to the awarding of the contract were complied with strictly.

In the case just cited the mayor and common council first voted to reject all bids and then reconsidered the same and awarded the contract. Then no rights under a contract had attached, but in the case at bar the award gave McCormick the contract.

In the case of *Illinois Trust & Savings Bank v. The City of Arkansas City*, 76 Federal 285, the Circuit Court of Appeals for the Eighth Circuit had occasion to consider the powers of a city to enter into a contract, and also determine at what point a contract with a city is considered complete and binding upon both of the contracting parties. The contract involved in that case was a contract with the City of Arkansas City, Kansas, for the building of a system of waterworks for the supplying of water to the city and the citizens thereof. The contention was made that the contract itself was void, assigning as reasons therefor: First, because the city had no power to vest in a private corporation the exclusive right to the use of its streets for the purpose of laying pipes to conduct water to itself and its inhabitants; second, because it had no power to grant the right to use its streets for that purpose for a term of twenty-one years; and third, because the ordinance which expressed the terms of the supposed contract was not originally passed by a vote of the majority of the members elect of the city council.

Counsel raised the question that it was beyond the power of the city to make the contract, because it would bind the future officers of the city in their legislative

capacity. The court clearly pointed out the fact as heretofore stated in this brief in discussing this same case, that the contract with the city for the building of waterworks was the exercise by the city of its contractual powers and not of its governmental powers; that in making such a contract it is bound by the same rule as an individual and that it may contract by resolution or motion as well as by ordinance duly passed except where required to make contracts in that manner.

The court in this opinion in answering the contention of counsel that there was no contract, used the following language:

“Was there no contract? A proposition made by one contracting party and accepted by the other constitutes a contract. It evidences the meeting of their minds upon the terms of their agreement, and binds them both. If Ordinance No. 27 had been duly passed, it would have been nothing more than an offer by the city to make the grant and contract upon the terms set forth therein. If, after its passage, it had been accepted and acted upon by the gas company, it would have become an irrevocable contract. *City of Chicago v. Shelton*, 9 Wall. 50; *City of New Orleans v. Great Southern Telephone & Telegraph Co.*, 40 La. Ann. 41, 3 South 533; *Com. v. Proprietors of New Bedford Bridge*, 2 Gray 339; *City of Kansas v. Corrigan*, 86 Mo. 67. It can make no difference in the legal effect of such an acceptance whether the one party or the other makes the offer. If the gas company had offered to enter into a contract with the city on the terms contained in the ordinance, and the city had accepted and acted upon that proposition, the contract would have been as binding and irrevocable. But that was exactly what these parties did. The ordinance stood

spread upon the records of the council, but it had never been passed by that body. On February 12, 1887, the gas company filed with the council, and that body received in open session, its written acceptance of the terms of the contract set forth in the defeated ordinance, and its bond to complete the waterworks as provided therein. That acceptance and bond constituted as perfect an offer on the part of the gas company to enter into a contract on the terms of that ordinance as it could have made. On January 17, 1887, the city council resolved, 'That the waterworks erected by the Interstate Gas Company under Ordinance No. 27, be and hereby are, accepted by the City.' That resolution, and the actual acceptance and use of the works by the city, was as perfect and complete an acceptance of this proposition of the gas company as it was possible for the city to have made. *It was conclusive evidence that the minds of the parties had met upon the terms of a contract set forth in the ordinance, and from that time forth, if not before, the contract became complete and irrevocable.* There is no escape from this conclusion on the ground that the city could offer and accept this contract by ordinance only. The legislature granted to the city full power and authority to contract for the construction of these waterworks, and it nowhere prescribed the mode by which the city should authorize or make the contract. It is common learning that where a statute authorizes action by the legislative body of a city, and does not require such action to be taken by ordinance, it may be taken by a vote upon a motion or by the passage of a resolution. *Smalley v. Yates*, 36 Kan. 519, 524, 13 Pac. 845, 848; *Board v. DeKay*, 148 U. S. 591, 13 Sup. Ct. 706; *Brady v. City of Bayonne* (N. J. Sup.), 30 Atl. 968; *Courter v. Board*, 54 N. J. Law 325, 23 Atl. 949; *City of Green Bay v. Brauns*, 50 Wis. 204, 6 N. W. 503; 1 Dill. Mun. Corp. (4th Ed. Sec. 307) and notes; *State v. Jersey City*, 27 N. J. Law 493; *Butler v. Passaic*, 44 N. J. Law 171; *Merchants' Union Barbwire Co. v. Chicago, B. & Q. Ry. Co.*, 70 Iowa 105, 28 N. W. 494; *Sower v. City of Philadelphia*, 35 Pa. St. 231; *San Francisco Gas Co.*



v. City of San Francisco, 6 Cal. 190; First Municipality v. Cutting, 4 La. Ann. 335; City of Crawfordsville v. Branden, 130 Ind. 149, 28 N. E. 849; McGavok v. City of Omaha, 40 Neb. 64, 58 N. W. 543; Arkadelphia Lumber Co. v. Arkadelphia, 56 Ark. 370, 19 S. W. 1053; State v. Barbour, 53 Conn. 76, 22 Atl. 686; Nicoll v. Sands, 131 N. Y. 19, 29 N. E. 818; State v. Henderson, 38 Ohio St. 644; Green v. City of Cape May, 41 N. J. Law 45.

“\* \* \* \* \* The result is that the City of Arkansas City made an irrevocable contract with the Interstate Gas Company, the terms of which are evidenced by Ordinance No. 27, and that none of the provisions of that contract which are in question in this suit are invalid on the ground that the city exceeded its powers in making the contract.”

This decision in our opinion conclusively establishes the rights of the complainant below and sustains our contention that the city, having passed a resolution providing for the paving of the streets in question, the City Clerk in conformity with that resolution having advertised for bids, the City Engineer having in conformity with the direction of the Mayor and City Council prepared plans and specifications upon which the bids should be made and by which the work should be done, and the plaintiff and others having filed their bids with the City Clerk on or before the time provided for the filing thereof, and the Mayor and City Council in open session having resolved to adopt the ten-year maintenance contract and having found that the bids of David McCormick for the paving of these various streets and the making of these improvements were the lowest and best bids, and having awarded

the contracts to him for the doing of this work, that constituted an acceptance of the propositions of David McCormick and concluded the contracts.

These contracts were irrevocable on the part of either McCormick or the City of Oklahoma City. Suppose after these various contracts had been awarded to David McCormick, he had refused to perform the same. Would it be said that he was not bound by the contract? Could not the City have held his cash deposit or certified check which he deposited with the clerk in payment of such damages as it might have sustained by reason of McCormick's refusal to carry out his contract? Certainly it could. McCormick was bound from the very moment that the City by resolution or motion accepted his bids and awarded him the contracts. The City was equally bound from that moment and it did not have the power after it had awarded the contracts without the consent of McCormick to reconsider those awards and to give the work to the Conway Company.

As stated in the case of *Illinois Trust & Savings Bank v. The City of Arkansas City*, *supra*, there was a valid contract between the parties which was irrevocable.

The Supreme Court of the United States in the case of *City of Chicago v. Sam W. Greer*, 9 Wall. 726, 19 Law Ed. 769, expressly held to the doctrine for which we here con-

tend. The opinion was by Mr. Justice Strong, and he stated the facts in the following language:

“This was an action brought by Samuel W. Greer against the City of Chicago to recover damages for a breach of an alleged contract by which the defendant had undertaken to receive and pay for 13,000 feet of leather hose that the plaintiff had agreed to manufacture and deliver. The principal questions mooted at the trial were whether the contract set forth in the declaration was approved, whether the plaintiff had complied with the obligations assumed by him so far as he had not been relieved by the defendant and what damages if any had been sustained by the plaintiff in consequence of the refusal of the city to receive the hose and pay for it according to the contract. The jury found a verdict for the plaintiff for \$1193.50, upon which judgment was entered and the defendant has sued out on this writ of error.”

After considering a number of exceptions that were presented the Court then finally in discussing the point involved in this case, said:

“We pass now to the exceptions taken to the charge of the court. They are to so much of the charge as relates to the time within which the contract was to be performed, and also to so much as relates to the testing of the hose and also to so much as relates to the failure to put the contract in writing. In regard to these it may be observed that they are not taken conformably with the fourth rule of the court, which requires an exceptant to state distinctly the several matters of law in the charge to which he excepts, and declares that such matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court. But we have examined the entire charge and found nothing of which the plaintiff in error has any just reason to complain. It was fairly submitted to the jury to find what the contract was, whether it

had been concluded; what the parties had agreed respecting the time for performance by the plaintiff; whether the plaintiff was in any default; whether the hose offered came up to the required standard and whether the tests applied had been made as the contract required, 'in a fair and impartial manner.' In regard to the failure to put the contract in writing the court said little more than to express regret that the City usually made such contracts (as it had been proved) without reducing them to a written form, adding only, 'that if the advertisement (for proposals) is clear and distinct, and if the proposals are also clear, and they are accepted in the terms in which they are made, simply and absolutely, that contains the contract between the parties.' Surely this was unexceptionable. We add only, that a motion for a new trial, being an appeal to the discretion of the court in which the trial has taken place, the action of that court in overruling it is not reviewable in error."

We have examined the citator decisions of the Supreme Court of the United States and the most diligent search has not enabled us to find any case in which the doctrine laid down in this opinion on this point has in any way been modified.

The same doctrine is again laid down in the case of *Jas. W. Harvey et al. v. United States*, 15 Otto 671, 26 L. Ed. 1206. This case involved the letting of a contract by the government for the building of certain piers and abutments for a rail and wagon road bridge between the island of Rock Island and the City of Davenport. The advertisement, the plans, the specifications, the bid of the contractor and the award were all plain and specific. Subsequently a formal written contract was duly executed, but

which differed somewhat from the contract as evidenced by the plans and specifications and the bid of the contractor and the acceptance by the government.

The court in that case held that the real contract between the parties was evidenced by the written bid, the advertisement for proposals and the acceptance by the government and these instruments prevailed over the subsequent formal written contract in those parts in which the contract was at variance therewith. In the syllabus of the case the court used the following language:

“A written bid to perform work for the government in connection with an advertisement for proposals by the United States and the acceptance of that bid, constitutes the contract between the parties.”

And then in the body of the opinion which was prepared by Mr. Justice Blatchford, it is said:

“The written bid in connection with the advertisement, and the acceptance of that bid, constituted the contract between the parties so far as regards the question whether the contract prices embraced the coffer-dam work. *Garfield vs. U. S.*, 93 U. S. 242 (XXIII 779); *Ins. Co. l. Hearne*, 20 Wall. 494. The written contract in that respect was intended by both parties to be merely a reduction to form of the statement as to the work and prices contained in the bid. If the formal contract is susceptible of a different construction, to the prejudice of the contractors, it is very plain that not only the contractors but the officers of the government were under a mistake. It is shown that the work of making and putting in the coffer-dams and doing whatever else was necessary, in connection with them, before the laying of the masonry could be commenced, was so expensive as to make it impossible

that the prices named in the bid of the appellant could have covered that expense and the laying of the masonry also. There is no evidence to show that the parties intended to alter the terms of the bid as to work and prices. There are no other considerations dwelt upon in the dissenting opinion of Judge Nott in the court of claims and to which it is necessary only to refer, which enforce the conclusion thus reached. One of those considerations is, the terms of the only other bid, as showing by the prices therein named for bid 1, bid 2 and bid 3, each separately, that the appellants could not have been bidding for the work complete. The evidence on the point in question on the part of the appellants is largely in documents, while that relied on by the United States is oral, and some of it consists of recollections of conversations with the appellants, who are debarred by statute from being witnesses in their own behalf. We are of opinion that by the actual contract between the parties, the appellants were not to do any of the work covered by the claim made by them under item 1 of the petition herein, and that the written contract must be reformed accordingly."

The Supreme Court of the United States in the case of *Celucius Garfield v. United States*, 3 Otto 242, 23 L. Ed. 779, considered the effect of notice of proposals for carrying the mails, the making of the bid, and the acceptance of the same, and held that these when taken together, if their terms were specific and certain, constituted a valid and binding contract. The court said:

"A proposal to carry the mails and the acceptance of the proposal by the Post Office Department creates a contract of the same force and effect as if a formal contract had been written out and signed by the parties."

In the case of *Wm. Rand, Respondent, v. Mayor, Aldermen and Commonalty of the City of New York*, 83 N. Y. Rep. 254, was involved an alleged contract for the paving of streets. The court said:

“If the ordinance for paving the street was regularly passed and the proceedings prior to the opening of bids were regular and valid, then we are of the opinion that the plaintiff had a valid contract with the city for the breach of which he can claim damages. \* \* \* Having such a contract it was binding upon both parties and could not be destroyed by a subsequent action of the common council rescinding the ordinance. That action might arrest the performance of the contract, but could not destroy its obligation. The city could break its contract, but would remain liable for damages for such breach.”

In the case at bar, as the Court has already observed, the contracts were complete and the complainant or plaintiff below was proceeding to discharge the work and the action was to prevent the city officers and The Conway Company from interfering with the plaintiff in the prosecution of the work involved in the contracts. This action was entirely different from an action in mandamus to compel a city to execute a contract. It was to prevent persons from unlawfully interfering with the complainant or plaintiff below from doing the work under the contracts already entered into between him and the city.

In the case of *People ex rel. Ryan v. Mayor, etc.*, 31 N. Y. Sup. 920, Presiding Justice Dwight on behalf of the Court handed down an opinion in which he denied mandamus to compel the mayor to execute a written contract



to the relator in conformity with the award thereof made by the Mayor and City Council of the City of Rochester. The court said *madamus* would not lie, but it recognized that a valid contract might be entered into by the awarding of the contract and held that if so he was entitled to recover damages for its breach.

In the case of *Smith v. Mayor, etc., of N. Y.*, 10 N. Y. 504, it was held that the city was not bound to a bidder for the performance of work for the city until after his bid had been approved and ratified by the common council. The action is based upon the doctrine, however, that if a bid has been approved by common council and the contract awarded that it constitutes a valid and binding contract between the parties. All relief was denied the plaintiff in that case because the final act of the approval and award by the common council had not been made. The court in the first paragraph of the syllabus says:

“A proposition for regulating a street in the City of New York, made in pursuance of a notice by the street commissioner inviting sealed proposals for such work, although it would be the lowest regular offer made in accordance with the notice, and be reported to the common council by the commissioner as such, does not bind the corporation as a contract until approved and ratified by the common council.”

The Supreme Court of Massachusetts in the case of *McManus v. City of Boston*, 50 N. E. 607, considered the question of when notices, bids and resolutions of the character involved in the case at bar become binding contracts. The facts in that case were about as follows:

On October 27, 1896, the school committee of the City of Boston, having power under the statutes of 1895, Chap. 408, Sec. 2, with the approval of the Mayor, to designate for school purposes lands which the Board of Street Commissioners might thereupon take by purchase or otherwise, passed an ordinance requesting the Board of Street Commissioners to take by purchase or otherwise the land which the plaintiff in that case by his bill sought to compel the city to take and pay for, and that order was subsequently approved by the Mayor. When the order was passed the plaintiff was not the owner of the land. The approval of the order by the Mayor took place on November 5, 1895, and on that date the plaintiff bought the land for \$5700.00 in anticipation of the action of the school committee and street commissioners and shortly after offered it to the City for \$9500.00, saying to them that it was a fair price and he did not disclose what he had paid for the land. On December 22, 1896, the Board of Street Commissioners voted to purchase the land for the city for school purposes from the plaintiff for the sum of \$9500.00 and on the same day the plaintiff signed a written agreement under seal to convey the land to the city for that sum. The bill alleged that the plaintiff on that day agreed in writing with the Board of Street Commissioners to sell the land to the city for the sum of \$9500.00 and that the city through the board agreed to pay that sum. The answer of the defendant alleged that the plaintiff had merely offered the land for sale to the city for \$9500.00 in

the written paper referred to and the defendant denied that there was any agreement on the part of the Board of Street Commissioners other than that contained in its vote on December 22, 1896, which was to purchase the land from the plaintiff for the sum of \$9500.00.

The record failed to disclose that this vote to purchase the land for \$9500.00 was ever communicated to the plaintiff. It was, however, communicated to the school committee and on January 4, '97, passed an ordinance that the sum of \$9500.00 be paid to the plaintiff for the land upon his giving to the city a deed satisfactory to its law department, and also passed another order transferring funds to enable the payment to be made. The plaintiff's deed was not accepted and he brought suit to recover the purchase price, alleging a valid and binding contract. The report did not state whether or not there was in fact an agreement to purchase the land, but stated that the presiding justice ruled: "That the vote *only purported to be an authority* to the proper hand to accept from the plaintiff a deed when made out, and information to the school committee, and that it did not purport to be addressed to the plaintiff, or to make an executory contract with him before the deed should be passed."

The report further stated that defendant contended that the street commissioners were not its agents and had no power to bind it by an executory contract and that the plaintiff relied on this vote of December 22, 1896, as an

acceptance of the offer contained in his covenant to sell and as a sufficient memorandum under the statute of frauds.

Mr. Justice Barker ratified these findings and declared the law applicable thereto in the following language:

“The Board of Street Commissioners was a department of the city government, clothed with the duty and the power by virtue of the provisions of St. 1895, C. 408, Sec. 2, to take, by purchase or otherwise, at the request of the school committee, such lands for school purposes as the school committee, with the approval of the Mayor, should designate. Before the passing of the vote of December 22, 1896, the school committee had designated the plaintiff's land to be taken for school purposes; and, as we assume from the report, the plaintiff had made the offer contained in his covenant to sell. Under these circumstances, the natural interpretation of the vote was that it was an acceptance of the plaintiff's offer, and this interpretation is confirmed by the subsequent action of the school committee, on January 24, 1897, ordering the purchase price of \$9500.00 to be paid to the plaintiff. Whether the vote of December 22, 1896, was an acceptance of the plaintiff's offer, or was an offer to the plaintiff, it was a sufficient memorandum under the statute of frauds. *The recorded vote of a corporation, or of a committee acting upon a subject over which the committee has power, is a sufficient memorandum.* Chase vs. Lowell, 7 Gray 33; Johnson vs. Society, 11 Allen 123; Tufts vs. Mining Co., 14 Allen 407; Townsend vs. Hargraves, 118 Mass. 325; Argus Co. vs. Mayor, etc., of City of Albany, 55 N. Y. 495; Grimes vs. Hamilton Co., 37 Iowa 290; Marden vs. Champlin, 17 R. I. 423, 22 Atl. 938; Browne St. Frauds, Sec. 346.

“The vote of December 22, 1896, as we construe it, purports to be more than an authority to the proper hand to accept from the plaintiff a deed when made out, and information of the school committee. Under St. 1895, C. 408, Sec. 2, it was the duty of the Board

of Street Commissioners to take the land for school purposes, by purchase or otherwise. The plaintiff was the owner of the land, and he is named in the vote which is to purchase the land of him for a sum mentioned. It, as the report assumes, his offer to sell for that sum was made before the vote was passed, the vote was an acceptance of his offer, and an agreement on the part of the Board to purchase the land from him, as well as an authority to accept a deed from him, and a means of information to the school committee. If the plaintiff's offer did not precede the passage of the vote then the vote was an offer to him to purchase the land from him at the price named and his covenant of the same date was an acceptance of this offer. If the vote did not purport to be addressed to the plaintiff, it was yet an act done by the Board of Street Commissioners in pursuance of its power, and in discharge of its duty to take the land by purchase or otherwise; and it was either an acceptance of the plaintiff's offer, or it was an offer to him which he could accept. It is not necessary that the memorandum should be addressed to the other party to the contract, so far as the statute of frauds is concerned, nor if it was passed as an offer to the plaintiff or as an acceptance of his offer, is it necessary that the vote should be addressed to him. The board which passed it had power to purchase the land of him. *If this offer to sell was then before the Board the vote concluded a contract with him to purchase his land;* and, if his offer was not then in, the vote was itself an offer to him, and, *by his acceptance by the covenant to sell, the vote became part of a contract with him.* The circumstances are wholly different from those of *Dunham vs. Boston*, 12 Allen 375. *There the vote was in form only, a recommendation on the part of a board which had the disposal of the public lands and which was under no obligation to make a disposal of them. Here the vote is in form a vote to purchase, for a sum named and of a person named, who was the owner and it was the duty of the Board which passed*

the vote to take the land for the defendant for school purposes, by purchase or otherwise. In *Dunham vs. Boston* the vote did not import a contract, but was merely a step which might result in a sale. So, in *Edgemoor Bridge Works vs. Inhabitants of Bristol Co. (Mass.)*, 49 N. E. 918, the vote was but a step towards the making of an executory contract. *But here the vote itself imports a contract of purchase by its own terms, and it must, we think, be construed as a binding agreement to purchase, either upon its passage if the plaintiff's offer to sell was then in, or upon the making of his covenant if that was made after the vote.* Under the provisions of St. 1895, C. 408, the Board of Street Commissioners had the power to purchase the land for the city and it was the duty of the board to take the land for the city by purchase or otherwise. It follows that the board was the agent of the city to make the purchase, and had power to bind the city by an offer to the plaintiff, *and also to bind the city by accepting the plaintiff's offer to sell.*"

In this case the court clearly held that the passing of the resolution and the acceptance by the plaintiff (*McManus*) constituted a valid and binding contract for the sale of the land to the City and it also held: "The recorded vote of the corporation or of the committee acting upon a subject over which the committee has power, is a sufficient memorandum within the statute of frauds;" and again in discussing the resolution the court says:

"If this offer (of the plaintiff) to sell was then before the board, the vote concluded a contract with him to purchase his land; and, if his offer was not then in, the vote was itself an offer to him and by his acceptance of the covenant to sell, the vote became part of the contract with him."

And so likewise in the case at bar, the City having provided the plans and specifications for the improvements

of the streets; having given the notice and passed the resolutions to pave and make the improvements as provided by law; having advertised for bids and McCormick having filed his bids and the Mayor and City Council of Oklahoma City having accepted his bids and awarded the contracts to him for the making of these improvements, these acts constituted valid and binding contracts; and the acceptance of McCormick's bids, and the awarding of the contract to him, being public acts, and the public acceptance of his offer to do the work at a stipulated price, no further notice to McCormick was necessary and from the moment these bids were accepted and the contracts awarded respectively by the Mayor and City Council the contracts thereby became closed and consummated and the Mayor and City Council could not lawfully thereafter do any act which would impair the obligations of these contracts as indicated by the acceptance and specifications, the bids and the award.

And in the case at bar, like the one just referred to, it may well be said, as it was said in that case, "but here the vote (of accepting the bid and awarding the contracts to McCormick) itself imports a contract of purchase by its own terms (for the making of the improvements) and it must, we think, be construed as a binding agreement to purchase (to do the work) either upon its passage if the plaintiff's offer to sell was then in, or upon the making of his covenant if that was made after the vote." McCormick's bids were already in under the notice, plans, specifi-



cations and resolutions for the performing of the work, and therefore the accepting of his bids and the awarding of the contracts to him evidenced a formal acceptance and assent to the contracts. By that act on behalf of the Mayor and City Council, every detail for the performing of the work and the payment of the same was agreed upon.

The Supreme Court of Massachusetts by clear implication in the case of *Madden v. City of Boston*, 58 N. E. 1024, recognized the doctrine that a vote by a municipal corporation accepting a bid or indicating a present intention to consummate a contract is valid and binding. In that particular case, however, the court held that the vote of the trustees of the Franklin fund held by the City of Boston for selecting a particular site for the erection of a Franklin Trades School, but which did not describe any particular tract of land or the price to be paid therefor, did not constitute a binding contract for the purchase of such land. However, in the opinion the court uses this language:

“The question before us is whether the vote of December 19, 1895, purports to be a binding contract of purchase by the managers of the fund or merely a vote under the authority of which a purchase was to be made. Looking first at the form of the vote, it seems to be no more than an expression of a determination to buy, and an authorization to an agent to make the purchase. It contains no words of present purchase. It does not assume the form of a contract. It is not addressed to the land owner and does not even mention his name. Jaquity, the owner's agent, is referred to only for the purpose of stating what land is to be bought and the terms upon which the purchase is au-

thorized. It purports to be for the guidance of the board of managers and their agents. They were not a municipal corporation whose doings must be shown by public records, but they were managers or trustees, acting under the will of Benjamin Franklin."

In the case at bar the defendant was a municipal corporation whose acts by virtue of law had to be made a matter of public record. The Mayor and City Council had before it the propositions made by David McCormick for the construction of the improvements and it unequivocally accepted his bids and awarded to him the contracts and made those acceptances and awards matters of public record, showing the names of the councilmen voting for and those voting against the awarding of such contracts. These acceptances and awards of the contracts to him were matters of which he not only had a right in law to take notice, but under the statute had to take notice, and no further notice to him was necessary.

And the case of *Willis v. Hoss* (Ind.), 16 N. E. 800, is a case which was decided by the Supreme Court of Indiana. The town of Brightwood, Indiana, by its proper officers, the trustees of the town, passed a resolution to make certain street improvements, including sidewalks, and made and adopted plans and specifications of the nature, character and plans of such improvements, by the unanimous vote of the board, which order, specifications and vote were filed with the proper officer and recorded in the proper records of the town, setting out copies thereof; that thereafter in 1883 the board of trustees ordered its clerk to ad-

vertise in the Indianapolis Times for seven consecutive days for proposals or bids for the doing of the work, which advertisement was made in due form and like notices were posted in four public places in the town prior to the day fixed for receiving such proposals, April 26, 1883, giving a copy of such advertisement; that on the last day written proposals to do such work were received by the board of trustees from three different parties, of whom Hoss was one and he proposed to do the work according to the plans and specifications for 78c per lineal foot for sidewalks on each side of the street; Hoss' proposal and bid for the work being the lowest and best bid received, it was accepted by the board of trustees at a regular meeting thereof. On April 26, 1883, another written acceptance thereof was entered of record in the proper record of the town, and a copy of the record was set forth in the plaintiff's bill.

It will be observed that the acceptance of this bid was by a resolution of the board of trustees. No other notice or written acceptance appears to have been given. Willis, who was an owner of certain of the land along the street, declined to pay for these improvements, and when called upon to make his payment denied the validity or binding force of the contract. Mr. Justice Howk in defining the acts necessary to constitute a contract for work of this kind with a municipality said:

“Defendant further claims that the complaint is bad, because ‘it fails to show a binding contract in writing to do the proposed work.’ It will be seen, however,

from the averments of the complaint, the substance of which we have heretofore given, that the written proposals of the town authorities of the work to be done, the written bid of plaintiff to do the proposed work and the written acceptance of such bid by the proper authorities, together constitute a contract to do the proposed work, wholly in writing, and valid and binding on the parties thereto. Such a contract we think was sufficient."

The Supreme Court of Kansas in the case of *Denton v. The City of Atchison*, 8 Pac. 750, speaking through Mr. Justice Johnson, handed down an opinion which involved the validity of a contract entered into, which was similar to the one in the case at bar. The only difference between the two was that after passing the resolution accepting the bid of the plaintiff, the city gave him notice of the acceptance of the same. The court held that there was a valid and binding contract between the plaintiff and the city, although no formal written contract was entered into, holding that the advertisement for bids for the work, the plans and specifications which by the notice and by the resolution of the Mayor and City Council were to be made the basis of the bids, the filing of the bids and the accepting of the bid constituted a valid contract.

In the case at bar McCormick was present at the time his bid was accepted, and the contracts awarded to him by the Mayor and City Council of Oklahoma City. In the opinion of that case Mr. Justice Johnson used the following language:

"It does not appear that any formal contract was

entered into between the parties. Soon after the plaintiff's proposal was accepted it seems that a contract, in brief form, was prepared by some person and signed by the plaintiff, which did not state the kind or dimensions of the lumber to be used for subsills, but it does not appear that the same was ever signed by the mayor, and it was not produced at the trial. So far as the testimony shows its provisions seem to have been substantially like those stated in the advertisement and proposal. No other contract or formality was required or necessary. The proposal of the plaintiff was clear and definite in its language, and its acceptance by the city was unqualified. Together they constituted the agreement of the parties under which the sidewalks were to be constructed, and by which the plaintiff's right to recover compensation therefor is to be determined. There could not well be, and, indeed, there seems not to have been any misunderstanding of the terms of the agreement. The advertisement for bids in plain terms provided that the walks were to be built in accordance with the plans and specifications on file in the office of the city engineer, and the proposal made by the plaintiff to the city in equally plain terms offered to construct the walks according to those plans. The plans, therefore, became a part of the agreement as much as if they had been incorporated in or attached to a formal written contract."

In the first paragraph of the syllabus of the opinion, which really states the law of the case, the court uses the following language:

"A city advertised for proposals for the building of certain sidewalks according to plans and specifications on file in the office of the city engineer, and in response thereto a contractor made a proposal to build the walks at a certain price, in accordance with such plans and specifications, and under the direction and to the acceptance of the city engineer, which proposal was duly accepted by the mayor and council of the city. *Held*, that the proposal of the contractor being definite, and

the acceptance by the city being unqualified, they together constituted a contract between the parties, and that the plans and specifications referred to in the proposal became a part of such contract.”

It will be observed from the latter portion of this paragraph of the syllabus that the court did not recognize the giving of the notice to the plaintiff of the acceptance of his bid as constituting any part of the contract because the court says: “That the proposal of the contractor being definite and the acceptance of the city being unqualified, they together constituted a contract between the parties and that the plans and specifications referred to in the proposal became a part of said contract.”

We wish also to call the Court's attention to the case of *Platte City v. Paxton* (Mo.), 124 S. W. Rep. 531. The question presented in that case as in the case at bar was as to when the contract between the city and the bidder for the public improvements was consummated. An ordinance was passed providing for the improvements; full specifications for the improvements were embodied in the ordinance. The specifications included the work of excavating and provided that the cost of such work should be treated as a part of the cost of such improvements. The Street Commissioner was ordered to prepare specifications and an estimate of the cost of the improvements, to file them with the City Clerk and then to advertise for bids. In obedience to this ordinance the Street Commissioner pre-

pared and filed plans and specifications which were the same as those embraced in the ordinance with the exception that they failed to mention the work of making the necessary excavating for the sidewalks. An estimate was filed at the same time, and in further compliance with the ordinance an advertisement was made for bids and in response thereto the plaintiff filed the following bid on October 2nd:

"I, W. A. Pryor, agree to furnish all materials, forms, labor, etc., necessary to build and complete the said sidewalks as specified in notice and to do all work according to specifications and in a workmanlike manner, for the sum of twenty cents per square foot."

At a regular meeting of the board of aldermen held October 2nd, a motion was carried that the bid of plaintiff, being the only bid and consequently the lowest and best bid, be accepted and it was also further ordered that W. A. Pryor construct the walks within thirty days from the time of the letting of the contract. No written contract was executed by the parties; the ordinance, bid and acceptance of the bid were the only evidence of the contract, and the contention of the city was that those instruments did not constitute a completed contract. In that particular case, however, the work was performed. *The statute of Missouri expressly provided that contracts made by a city be in writing and subscribed by the parties thereto, and if not so executed the assessments for the improvements should be invalid.* There is no such a provision in the Oklahoma statute. The statute merely points out how contracts for



public improvements shall be let, and every step prescribed by the statute was technically followed from beginning to end, and the formal written contract contended for by the defendant is nowhere contemplated by the statute. In the syllabus of this case of *Platte City v. Paxton, supra*, the court said:

“Where a city ordinance was passed authorizing a street improvement and plaintiff submitted a bid for the work, duly signed, which was accepted by a resolution of the city council properly passed and made of record, this was sufficient compliance with the Revised Statutes 1899, Section 6759 (Annotated Statutes 1906, page 3327), prescribing that contracts made by a city be in writing and subscribed by the parties thereto, so as to render the assessment for the improvement valid.

“A written contract can create no rights or obligation in excess of, or defeat those created by an ordinance; and where a city ordinance was passed authorizing a street improvement, the plaintiff submitted a bid for the work duly signed, which was accepted by a resolution of the city council properly passed and made of record, there was no necessity for a separate written contract.”

And then in the body of the opinion the court in discussing this question further, used the following language:

“Next, defendant insists that the assessment was invalid because no written contract was executed by the city and plaintiff (citing Section 6579, Rev. St. 1899, Ann. St. 1906, p. 3327). The ordinance, plaintiff’s written bid duly signed, and the resolution accepting the bid, which was duly passed and made of record, constituted a written contract, and were a sufficient compliance with the statute. It is the law that the written contract can create no rights or obligations in excess or defeat of those created by the ordinance; and this,

being true, what necessity can there be for the execution of a separate written contract?

“Defendant urges that the acceptance by the city did not close the contract, because it injected a new condition; *i. e.*, that the work should be completed in 30 days. The ordinance did not specify a time for the completion of the work, and therefore, by implication, required the improvement to be completed within a reasonable time. It appears that the motion accepting the bid merely specified a reasonable time, and therefore did not attempt to add a new condition to the contract expressed in the ordinance; but, if the time stated had been either unreasonably long or short, the ordinance would control, and that part of the motion should be regarded as mere surplusage because of its utter impotence.

“We conclude that the proceedings leading to the issuance of the tax bill were valid, and accordingly the judgment is affirmed. All concur.”

The doctrine laid down in this case is the position which appellant has taken in the case at bar, which is that the rights of the City and of David McCormick were absolutely fixed by the resolutions, the plans, profiles and specifications, the notices, the bids and the acceptances of the bids and the awards. And if there should be any conflict between a formal contract subsequently executed by the City and McCormick, the proceedings prior thereto as shown by the records would prevail. This was also held by the Supreme Court of the United States in the case of *Jas. W. Harvey et al. v. United States*, 15 Otto 671, 26 Law Ed. 1206, heretofore cited.

The written contracts contemplated by the parties was merely intended as a re-statement of the agreements and

contracts already entered into by the various proceedings—the bids and acceptances thereof—by the city council.

In the case of *Lane & Nearn v. Warren* (Texas), 115 S. W. Rep. 903, the court declared the law as follows:

“A submission of bids by contractors to build a house for a certain sum, not including the foundation, in response to a written notice by the owner that he proposed to build, was an offer by the contractors to erect the building for that sum.

“Where defendant unconditionally accepted plaintiff's offer to erect a building at a certain price, he could not thereafter require that the contract provide that the material should be purchased from a particular firm; *the contract being then completed.*”

In this case, after the bid was accepted, the party letting the contract sought to inject into the contemplated written contract an additional provision that the material for the improvement should be purchased from a particular firm at a stipulated price and the court held that the bid and acceptance of the bid for the improvement concluded the contract; *and although the parties refused to enter into the formal written contract contemplated*, the court held that the contractor had a valid contract evidenced by the specifications, the bid and the acceptance of the bid.

The Supreme Court of California in the case of *Argenta v. City of San Francisco*, 16 Cal. Rep., page 256, also adopted the doctrine for which we here contend. The opinion on rehearing was by Chief Justice Field, after-

wards an Associate Justice of this Honorable Court. In discussing the question as to whether or not the proceedings of the council, the notice, invitation for bids, the filing of the bid and the accepting of the bid, constituted a valid contract, the court said:

“It will be thus seen that the charter vests in the common council the authority to order the improvements in question, and directs the mode in which the intention to make the same shall be indicated, the conditions upon which the work shall proceed, and the parties to whom the contract shall be awarded; and the general ordinance of November, 1852, designates the officer under whose supervision, on behalf of the city, the work shall be done. In the present case, the ordinance of July 21st, 1853, sufficiently indicates the intention of the common council to make the improvements; it states the work to be done, and the character of the grade, it calls for proposals and directs the award of the work; and the charter determines the party to whom the award shall be made. The ordinance was duly published, the advertisement duly made, the proposals received, and the work awarded. The contract was thus complete on both sides, and no protest having been interposed, it only remained to carry the same into execution. It is, therefore, of no moment, in my judgment, whether or not the Street Commissioner had authority to bind the city by the particular written instrument embraced in the record. *The parties were mutually bound by the proceedings previously taken*—the contractor in accordance with his bid and accompanying specifications, which were accepted—the city to pay him either directly, or to collect the amount by assessment upon the property, and transfer it to him. The drawing up of a formal contract, specifying its terms, is the usual proceeding upon the acceptance of a bid for a contemplated improvement; and for many reasons, should be insisted

upon, especially to avoid dispute as to the extent and details of the work. This can, however, only be a matter of moment, when it is attempted to enforce the contract against the contractor, or to hold him responsible for its imperfect fulfillment. It is of no consequence, where there is no complaint on the part of the city as to the performance of the contract."

Then on page 281 of the opinion the court says:

"It follows, from the views I have expressed, that the acceptance of the proposals of Barton by the Street Commissioner and the committees of the two boards, under the direction of the ordinance of July 21st, 1853, and those of Swain by the city in proper form, converted what were previously mere propositions of the city into contracts, perfect in all their parts, binding alike upon the city and the contractors."

And finally on page 283 of the opinion the court uses the following language:

"But I place my concurrence in the judgment heretofore rendered in this case upon the validity of the contracts with the city, which were completed by the acceptance of the proposals of the contractors, and the primary liability of the city for the work performed thereunder. I have been thus explicit because I do not consider that, independent of such contracts, any liability would attach to the city for the improvement of the streets."

The court in this opinion expressly holds that the accepting of the bid and the proceedings prior thereto constituted a valid and binding contract, and the court also held that in the absence of such a contract the city would not be liable.

Attention is also called to the case of *Argus Co., Respondent, v. The Mayor, Aldermen and Commonalty of the*

*City of Albany*, 55 N. Y. Rep. 495. This case involved a printing contract. The court said:

“The plaintiff seeks to recover upon an agreement which, by its terms, was not to be performed within one year from the making thereof. It can do so if the agreement, or some note or memorandum, is in writing and subscribed by the party to be charged thereby. (2 R. S. 135, Sec. 2 [as amended, Laws of 1863, chap. 464, p. 802], sub. 1.)

“In this case the party to be charged, and whose subscription is needed, is the defendant, a municipal corporation. It is plain that such a defendant can make no note or memorandum, nor subscribe the same, save by an officer or agent thereof. It is so, also, that it ordinarily acts by its legislative or governing body, and that the action of that body is expressed in the minutes of its action, recorded, as it takes place, in the books kept for that purpose by its clerk or secretary. Hence it is that its agreements are rarely oral, but *pari passu* with the making of them, they are on the instant of formation put into writing, and thus a note or memorandum of them is made; and the minutes of the day's doings of the body, being signed by the clerk thereof, there is a subscription of the note or memorandum, made by the party, by its agent duly authorized. This is a satisfactory compliance with the statute. It meets the purpose and intention of the law, by providing an enduring and unchanging evidence of the agreement; and it meets its letter, for there is some note or memorandum of it in writing subscribed by the party to be charged thereby, the subscription made by an authorized agent. And so are the authorities. (*Johnson vs. Trinity Ch. Society*, 11 Allen 123; *Tufts vs. Plymouth Gold Mining Co.*, 14 *id* 407; *Chase vs. City of Lowell* 7 Gray 35; *Dykers vs. Townsend*, 24 N. Y. 57.)

Under all of these authorities the proceedings upon which the appellant relied constituted valid, binding, con-

cluded contracts, complete in all their details, between the City of Oklahoma City and the appellant, and the City of Oklahoma City did not have the power to take them away from the appellant and deprive him of the right to do the work and of the fruits and benefits of his contracts, because such action on the part of the city would be the taking of the appellant's property in violation of his rights under the Constitution of the United States.

The Supreme Court of Maine, in the case of *Brown v. Inhabitants of Winterport* (Maine), 9th Atl., page 844, said:

“A vote of the town ratifying the action of the selectmen in borrowing money which was applied to taking up outstanding debts of the town, cannot be reconsidered by a subsequent vote.

“The defendants again claim that, if we find there was a valid ratification, it was effectually rescinded by a subsequent vote at a legal meeting, August 15, 1885, passed before the treasurer had obeyed the former vote. The act ratified, however, was the borrowing the plaintiff's money by the then selectmen. That act had been done. The vote of ratification at once applied to the act and adopted it as the act of the town. The act was then as binding on the town as if the vote was prior, in time, to the act. It was then the town's act. The town had borrowed the plaintiff's money. A ratification after the act is as potent as authority before the act. The act is equally binding upon the principal in either case, and in neither case can the principal, after the act, relieve himself by a simple declaration of his change of mind. The cases cited by the defendants do not hold to the contrary.”

And so it is in the case at bar. After the Mayor and City Council had accepted McCormick's bids and awarded



the contracts to him, the Mayor and Council could not by a mere change of their minds relieve the city from the obligations of the contracts, evidenced by the plans, profiles, specifications, advertisements, bids and the awards.

In Dillon on Municipal Corporations, Vol. 2, Sec. 539 (see original edition 290), it is stated:

“At any time before the rights of third persons have vested a council or other corporate body may, if consistent with its charter and rules of action, rescind previous votes and orders.”

The affirmative statement of this rule, however, clearly implies that if the rights of third persons have attached that the Mayor and City Council cannot relieve the city of the binding obligation entered into by the previous vote.

In the case of *McConnoughey v. Jackson et al.* (Cal.), 35 Pac. 863, the court said:

“A valid claim, properly presented to the trustees of a municipal corporation and, allowed and approved by them, and their action accepted by the claimant, becomes a valid and binding contract, and can only be avoided for such cause as invalidates other contracts. Corporations can no more play fast and loose over their contracts than can individuals. In *Brown vs. Winterport*, 79 Me. 305, 9 Atl. 844, it was held that a vote ratifying a contract made by town officers without due authority could not be rescinded so as to affect the validity of the contract. In the present case, when the trustees, upon the presentation of petitioner's demand, allowed it, and ordered a warrant drawn on the treasurer for the amount, it established his right to a recovery, and being the amount asked for by him, he will be presumed to have accepted the action of the board, or, at any rate such presumption will arise

from his demand of the warrant and thereafter the board was not at liberty, without the consent of petitioner, to rescind its action, except for some reason which would defeat the claim, treated as a contract."

And the City Council could not rescind the awards to McCormick without his consent, and the awards being made for the amount of his bids, no notice of the awards under the statute were necessary and even if McCormick had not been present in the Council Chamber when the awards were made, he would be presumed to have accepted the action of the Mayor and City Council. The only purpose of the notice would be to ascertain of McCormick as to whether or not he would accept the contract to do the work under the plans and specifications, and he had already affirmatively stated that he would do so in his bids and the only thing left to be done to complete the contracts was for the Mayor and City Council to accept his bids and to award the contracts to him.

In the case of *Safety Insulated Wire & Cable Co. v. Mayor and City Council of Baltimore*, 66 Fed. 140, the United States Circuit Court of Appeals for the Fourth Circuit said that cities and towns as municipal corporations, possess a double character—the one governmental, legislative or public; the other proprietary or private, and that in the former such a corporation is made by the State one of its instruments for the exercise of certain political powers, which cannot be controlled or embarrassed by any contract of the corporation; but that in its proprietary or

private character powers are conferred for the private advantage of the particular corporation, and as to such powers and contracts made thereunder, such corporations are to be regarded as private corporations.

And then the court said:

"The city of B. passed an ordinance directing certain officials to advertise for proposals for furnishing cables, conduits, etc., and placing the police and fire alarm telegraph wires belonging to the city under ground, and after deciding upon the best cables, etc., to award a contract for furnishing the same and doing the work. Said officials, after due advertisement, accepted the proposals of the S. Co. That company two days later, declared itself ready to begin work, but on the same day was notified that the acceptance of its proposal had been reconsidered because of an opinion of the city solicitor that the ordinance authorizing it was defective in certain matters of detail. *Held*, that such attempted revocation of the assent of the city was no defense to an action by the S. Co. on the contract."

And in the case of *Daush v. Crane* (Mo.), 19 S. W. 61, the court said:

"A resolution of the Board of Aldermen passed pursuant to act of March 18, 1895 (Territorial Laws, page 501), authorized the Mayor to compromise with the claimants of certain commons by conveying to them the land claimed at a certain price. *Held*, in ejectment against one deriving title from the Mayor's deed, that whether or not the land conveyed was the same as that claimed, was, the evidence being conflicting, a question for the jury.

"A subsequent resolution of the Board of Aldermen repudiating the deed, and declaring that it was made without authority, did not affect its validity, and was not admissible in evidence."

And in *State v. Phillips* (Me.), 11 Atl. 274, in commenting upon the powers of the Mayor and City Council to reconsider a matter, the court said:

“When an assessor has been elected by ballot by a municipal body and his election has been declared and entered of record, it cannot be reconsidered at an adjourned meeting on a subsequent date, and a new election had.”

Mr. John W. Smith in his work entitled, “The Modern Law of Municipal Corporations,” Vol. 1, Sec. 309, says:

“As intimated in the preceding section, when the rights of third parties have accrued under the proceedings of a public body they cannot be affected by a declaration of its change of mind. Thus, a vote ratifying a contract made by town officers without due authority cannot be rescinded so as to discharge the town from its obligation. The point at which the election of a public officer by a meeting convened for that purpose passes beyond its control and becomes irrevocable has been considered in several cases. While it is universally admitted that a ballot may be set aside for some irregularity or illegality before the election is declared, it was stoutly maintained by the Supreme Court of Errors of Connecticut that a common council, having appointed an officer by ballot whom it had no power to remove, could not nullify the appointment by a mere declaration that there was error in the ballot when there was none, and by a subsequent appointment of another person. It was also held, in Maine, that after a city officer has been declared to be chosen by the Board of Aldermen and the declaration recorded, the board cannot at an adjourned meeting held the next day, reconsider its action and choose another.”

We also cite the court to the case of *Detroit Advertisers and Tribune v. City of Detroit* (Mich.), 5 N. W. 176. And

in Cyc. of Law and Procedure, Vol. 28, 682, Sec. 2, it is provided:

"Municipal corporations do not possess sovereign power to abrogate or change contracts at will and pleasure, but may repudiate, modify or rescind them only under the same conditions and for the same causes as private corporations or persons, as when the contract is void, or the right to revoke is reserved. Even if a municipality has the right to rescind a contract it can only do so by giving notice of the rescission to the other party, particularly where the contract itself requires notice. Immaterial modifications may be made by the council, even of contracts let on biddings, although not without the assent of the contractor, nor may the price of such contract be increased."

In American and English Encyc. of Law, Vol. 20 (Second Ed.), page 1215, the rule is thus stated:

"The governing body of a municipal corporation has as a rule the power, if vested rights are not thereby interfered with, to reconsider and rescind action previously taken. Where, however, the rights of third parties have intervened between the action and its attempted rescission, the latter will be ineffectual and void."

Of course, where there are vested rights by virtue of the contract, as in the case at bar, the City Council cannot without the consent of the other party to the contract rescind its action in awarding the same.

The Legislature of Oklahoma recognized in express terms that the notice inviting bids, the plans and specifications, the accepting of the bid and awarding of the contract by the Mayor and City Council constitute a valid and

binding contract for the making of public improvements, and the statute nowhere contemplates that any other written contract shall be entered into. Sec. 725 Snyder's Compiled Laws of Oklahoma (in the first portion of this section), provides "That the Mayor and City Council shall adopt a resolution reciting that no such protest has been filed (by the property owners), or the filing of such petition as the case may be, and expressing the determination of the Council to proceed with the improvement, defining the extent, character and width of the improvement, stating the material to be used and the manner of construction, and such other matters as shall be necessary *to instruct the engineer in the performance of his duties in preparing for such improvement the necessary plans and plats, profiles, specifications and estimates*; said resolution shall set forth in such reasonable terms and conditions as the mayor and council shall deem proper to impose with reference to the letting of the contract and the provisions thereof. It will be seen from this language quoted in Section 725 of the Oklahoma statutes that it is contemplated by the law that the plans, plats, profiles and specifications shall set forth the extent, character and width of the improvement and shall state the material to be used and the manner of construction and such other matters as shall be deemed necessary to instruct the engineer to prepare the plans, plats, profiles, specifications and estimates; and these plans, plats, profiles, and specifications are a complete statement of the character and extent of the improvement and the material to be used

therein, and the manner of its construction; and then in the latter part of this same section, referring to the filing of the bids and the awarding of the contract, it is said: "At the time and place specified in such notice, the Mayor and Council shall examine all bids received, and without necessary (unnecessary) delay, award the contract to the lowest bidder who will perform the work, furnish the material which may be selected and perform all the conditions imposed by the Mayor and Council as prescribed in such resolution and notice for proposals, which contract shall in no case exceed the estimate of costs submitted by the engineer with the plans and specifications."

The Legislature advisedly used the language "*which contract shall in no case exceed the estimate of costs submitted by the engineer with the plans and specifications.*" What contract? *The contract, of course, evidenced by the notices, resolutions, plans, plats, profiles and specification the bid filed and the award of the contract by the Mayor and City Council; and there is no foundation whatever in our opinion for the contention that the contracts in question were not completed when the Mayor and City Council first accepted McCormick's bids and awarded the respective contracts for the improvements to him.*

It is true that the notice calling for the bids provides, "Each bid must be accompanied by a certified check in the sum of three per cent (3%) of the amount bid, to be forfeited to the City in case the successful bidder fails to



enter into a contract and give the required bond within the required time." The law as shown by the foregoing authorities is, that the contract is not entered into until the bid is accepted and the contract awarded. Therefore the contractor may at any time withdraw his bid before the contract is awarded to him by the Mayor and City Council, and this forfeiture only means that if he fails to stand by his bid and to execute the bond provided for, that he shall forfeit his three per cent. But even if the other interpretation be given to this language—that is, that the bidder agrees after the award is made to execute with the City a formal written contract, restating the contract as evidenced by the notices, resolutions, plans, plats, profiles and specifications, the bid and the award, as shown by the decisions of many of the courts which we will hereinafter cite—this does not in any way detract or lessen the validity and binding force of the contract entered into by the awards made by the Mayor and City Council. Those acts on the part of the City concluded it from thereafter asserting that there were no contracts between it and the complainant.

The language used in the specifications (see page 51 of printed record) is the same as that used in the published notice, which is: "All bids for work to be performed under this contract shall be accompanied by a certified check for three per cent (3%) of the bid..... Dollar (\$....), and in case of failure on the part of

the successful bidder to enter into contract within twenty days after notice of acceptance of such bid said check to become the property of the City of Oklahoma City as liquidated damages for failure to enter into such contract; upon execution of said contract within twenty days said check to be returned to the bidder furnishing it."

Then follows a provision with reference to the bond. Now, this language must be interpreted in the light of the conditions then existing. In the first line of the specifications it says, "all bids for work to be performed under this contract shall be accompanied," etc. What contract? No contract had at that time been entered into, but it was the intention of the Mayor and City Council that the specifications themselves should ultimately become a part of the contract between the successful bidder and Oklahoma City, and therefore the language, "*this contract*," is used because the specifications are to be a part of whatever contract is made, and the bid and the award are to be based upon these specifications. There is nothing in the notice, specifications or resolution indicating that the contract for the work should not be considered as concluded until after the formal written contract was signed up by the City on the one side and the successful bidder on the other. On the contrary the statute itself, which we have quoted above, clearly shows that the contract is complete when the award is made. And the language of the motion filed and carried, as shown by the record of the City Council, is "Moved by

Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick, being the lowest and best bid, be accepted, and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Peshek, Johnston, McWilliams and Davie. Nays: Messrs. Workman, Helm and Land."

There is nothing in this acceptance of the bid and the award of the contract indicating merely a determination to enter into a contract with McCormick in the future. It is a present accepting of his bid then and there, and an awarding then and there of the contract for these various improvements to him.

Therefore we contend that the contracts were completed when the bids were accepted and the awards made, and even if it were agreed by reason of the statement in the specifications and in the notice that a more formal contract should be subsequently entered into, this would not in the least detract from our position, that the city is bound by the awards because in such circumstances the subsequent signing and executing of formal written contracts would not leave the agreements open or in any way contingent upon the execution of such writings, and neither party after the awards could withdraw from the contracts already entered into without the consent of the other.

**The Reconsideration of the Award to McCormick and Another Award for the Improvements to The Conway Company by the City Council Was Void.**

**THIRD PROPOSITION:** *That the Mayor and City Council of Oklahoma City had no power or authority in law to reconsider the awards made to David McCormick for the improvement of the streets in controversy and had no power to again award the contracts for the making of these improvements to The Conway Company.*

It was contended by the defendants in the court below that although the City Council had accepted McCormick's bids and awarded the contracts to him, it subsequently reconsidered those awards and vacated the same and accepted the bids of The Conway Company and awarded the contracts for the improvements to it. This the Mayor and City Council had no power to do. Its duties were completed and its powers exhausted when it awarded the contracts to McCormick. On page 79 of the record will be found the following entries appearing on the minutes of the City Council of Oklahoma City, which was marked "Exhibit C:"

"Minutes of Meeting of City Council, Nov. 2, 1908. Meeting of November 2, 1908.

"Bids were opened and read for the constructing of paving as per advertisements for bids, ending at 5 o'clock p. m. November 2, 1908."

Then on page 79 of the record was introduced the

proceedings of the Mayor and City Council under date of November 4, 1908, which are as follows:

“Moved by Mr. Byers, seconded by Mr. McWilliams, that the council reject all bids for asphalt paving based on five years guarantee. Motion carried by unanimous roll call vote.

“Moved by Mr. McDavie, seconded by Mr. McWilliams, that all bids of J. F. Hill for paving of the different streets as per advertisement for bids, ending at 5 o'clock p. m., November 2, 1908, be rejected and not considered, as samples of materials to be used submitted by him were not in accordance with specifications of the city engineer for this work. Motion carried by unanimous roll call vote.

“Moved by Mr. Helm, seconded by Mr. Land, that all bids for asphalt paving be rejected and the clerk instructed to re-advertise for bids for this work.

“Moved by Mr. McDavie, seconded by Mr. McWilliams, as a substitute for Mr. Helm's motion, that the bids for asphalt paving be taken up street by street and contracts awarded to the lowest and best bidder.

“Substitution motion carried by roll call vote.”

Then on page 79 of the printed record was introduced the minutes of the meeting of City Council of November 4, 1908, awarding contracts for the paving of certain streets to David McCormick, which record is as follows:

“Oklahoma City, Okla. November 4, 1908.

“Council met in adjourned session at 2:30 p. m. with Mayor and following members present: Highlev, Workman, Helm, Peshek, Johnston, McWilliams, McDavie, Land and Byers came in later.

“Moved by Mr. Workman seconded by Mr. Helm. that Council reconsider action taken at meeting held

in forenoon of this date, 'that the bids for asphalt paving be taken up street by street and contracts awarded to the lowest and best bidders.' Motion lost by the following roll call vote: Ayes: Workman, Helm. Nays: Highley, Peshek, Johnston, McWilliams, McDavie and Byers.

"City Engineer Burke reported that the bid of David McCormick was the lowest and best for the paving of Second Street from the West line of Western Ave. to the North line of Blackwelder Ave., Oklahoma City, Okla.

"The bids were as follows:

DAVID MCCORMICK.

Asphalt paving inc. 5" Portland C. Con. Found.	
10 y. Guar. per sq. yd.....	\$ 2.10
Earth excavation per cu. yd.....	.35
Concrete curb. and Gut. Str. 6" curb. per lin. ft.	.75
Concrete curb. and Gut. Rad. 6" curb. per lin. ft.	.75
Concrete double gutter, per lin. ft.....	.75
3" Oak Header, per lin. ft. ....	.15
129 Vit. Pipe in place with backfill, per lin. ft.	
10" 60c; 12" 80c; 18" 1.55; 21" 1.75	
15" 1.00.	
Manholes complete at .....	40.00
Catch basins at .....	20.00
Approx. total .....	\$23558.25
F. R. Conway total.....	23574.00

"Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick, being the lowest and best bid, be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Peshek, Johnston, McWilliams and McDavie. Nays: Messrs. Workman, Helm and Land."

Then the same record was made as to each of the other streets and the Mayor and City Council took up

the different streets and the various bids, street by street, and bid by bid, and accepted each of the bids of David McCormick and awarded each of the contracts to him for the streets involved in this case.

Then after the contracts were awarded (see page 89 of the printed record), the following proceedings were had by the Mayor and City Council:

“Oklahoma City, Oklahoma November 4, 1908.

“Moved by Mr. Helm, seconded by Mr. Workman, that the action of the council in awarding contracts for asphalt paving at this meeting be rescinded. Motion lost by the following roll call vote: Ayes: Messrs. Workman, Helm and Land. Nays: Messrs. Highley, Peshek, Johnston, McWilliams, McDavie and Byers.”

Then on November 9, 1908 (see page 89 of printed record), at the meeting of the Mayor and City Council, the following proceedings were had as shown by Council Record No. 12 at page 248:

“Oklahoma City, Oklahoma, November 9, 1908.

“Moved by Mr. Highley, seconded by Mr. Helm, that the council reconsider the action taken at meeting held November 4, 1908, ‘In rejecting all bids for asphalt pavement based on five year guarantee.’ Motion carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Peshek, Johnston and Land. Nays: McWilliams, McDavie and Byers.”

(Page 90 of the printed record):

“Moved by Mr. Highley, seconded by Mr. Corder, that the council reconsider the action taken at the



meeting held November 4, 1908, in awarding contracts for all asphalt paving.

"Moved by Mr. Land, seconded by Mr. McWilliams, that the council adjourn to meet at ten o'clock a. m., November 10, 1908, to give City Attorney Taylor an opportunity to investigate the laws in regard to the legality of above motion of Mr. Highley. Motion carried."

Then on November 10, 1908, as shown by council record No. 12, at page 250, the following proceedings were had:

"Oklahoma City, Okla., November 10, 1908.

"Council met in adjourned session 11 o'clock a. m., with the Mayor and following members present: Messrs. Highley, Workman, Helm, Corder, Peshek, McWilliams, McDavie, Land and Byers.

"Moved by Mr. McDavie, seconded by Mr. Peshek, that the council adjourn to meet November 11, 1908, at 8 o'clock p. m. to give the City Attorney further time in which to investigate the law in regard to Mr. Highley's motion to reconsider the awarding of contracts for asphalt paving. Motion carried."

Then on page 90 of the printed record the following proceedings were had by the Mayor and City Council as shown by council record No. 12, page 251:

"Oklahoma City, Oklahoma, Nov. 11, 1908.

"Council met in adjourned session with the following members present: Workman, Highley, Helms, Corder, Peshek, McWilliams, McDavie, Land and Byers and Johnston; Mayor being absent, Mont F. Highley, president of the council and acting mayor, presided:

"City Attorney Taylor gave verbal opinion—in regard to motion of Mr. Highley, made at meeting of

council November 9, 1909—"That the council reconsider action taken at meeting held November 4, 1908, in awarding contracts for asphalt paving." His opinion was that any time before the contracts are signed up by the City and the contractor that the council had the right to rescind its action in awarding said contracts. Moved by Mr. McWilliams, seconded by Mr. Helm, that the opinion of the City Attorney be received and placed on file. Motion carried (there being no opinion of the City Attorney to place on file, the only record of such opinion is the statement as above written. Clerk).

"Judge Burwell appeared before the council and spoke against the motion and Judge Harris spoke in favor of the same.

"Motion was made by Mr. Highlev as stated above, carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Johnston, Land. Nays: Messrs. Peshek, McWilliams, McDavie and Byers."

Then on page 267 of council record No. 12 appears the following (see page 91 of printed record):

"Moved by Mr. McWilliams, seconded by Mr. Byers, that Judge Burwell be granted permission to address the council. Motion carried.

"Judge Burwell presented the eighteen contracts of David McCormick for paving the different streets and demanded that they be accepted by the council."

Then on pages 91 and 92 of the printed record appears the proceeding of the City Council as shown by council journal No. 12, page 251, wherein they subsequently awarded the paving of these streets to The Conway Company on five year maintenance guaranty instead of ten years, as provided for in the bids and awards previously made to David McCormick.

It is contended by counsel for the defendants below that the City Council had the right and authority to reconsider this award to David McCormick and to accept the bids of The Conway Company. This we deny. When the Mayor and City Council accepted the bids of David McCormick and awarded the contracts to him, their powers in reference to that matter were at an end.

In support of this contention we wish to direct the attention of the Court to the case of *State ex rel. Coogan v. Barbour* (Conn.), reported in 11 Atl. 686, \_\_\_\_\_. There was a vacancy in the office of prosecuting attorney for the city of Hartford, Conn. The charter of the city of Hartford provided that the common council in joint convention should appoint a prosecuting attorney, but gave no direction as to the mode of appointment. After reciting these facts the court made the following observation:

"We have said the appointment was made when the result of the ballot was ascertained and declared. Nothing more was required of the convention. Its will had been expressed in a parliamentary and legal method, had been duly declared, and had become a matter of record. Declaring the result by resolution was unnecessary. No certificate or commission from the convention or its officers was required by law. Mr. Coogan's right to the office vested at once, and he might, without further ceremony, accept and qualify. We do not wish to be understood as denying the power of the convention to correct errors and to nullify the effects of fraud. If there was a palpable error or fraud, or if the ballot for any cause was illegal, the convention might undoubtedly treat it as void, and proceed to another election. If we were to look only

to the resolutions which passed, we might assume that there was an error in the ballot, and so give effect to the resolution. But the pleadings show that it was admitted that there was in fact no error or mistake. The mere declaration that there was an error when there was none, and the attempt to nullify the appointment on that ground, cannot be vindicated.

“These views are believed to be in harmony with the best and most carefully considered cases.”

It will be seen that the power conferred in this case was to appoint, and that no authority was given in the charter to remove one appointed from office. Therefore, when the vote was taken and it appeared from that vote that the party had been selected, appointed or elected to the office, the action of the appointing power was irrevocable; and so it was in the case of the Mayor and City Council of the City of Oklahoma City in awarding these contracts. The Statutes of Oklahoma then in force gave power to the Mayor and Common Council of the city to award contracts for improvements of this kind, but conferred upon them no authority to revoke or set aside a contract when it was once made or awarded.

The Mayor and Common Council of the City had no more power to reconsider the awards made to McCormick after the vote was taken and the awards declared than an individual would have after he had assented to and agreed to a contract of his own motion to set it aside and repudiate it without the consent of the other party thereto. And the authorities cited in the brief show that a city in its contractual relations stands upon the same footing as

an individual and can no more repudiate its solemn contracts than can an individual.

See case of *Theron E. Hall v. Inhabitants of Holden*, 116 Mass. 172, and authorities therein cited.

In the American & English Encyclopedia of Law, Vol. 20, page 1170, under the heading "Municipal Corporation," under sub-division "I," entitled "Effect of Acceptance—When Contract Arises," the author says:

"Though a bid made in response to an advertisement may be the lowest bid therefor, and in all respects regular and valid, no contract arises until the acceptance thereof by the city authorities. But where a bid has been accepted and the contract awarded, a binding contract is created for the breach of which the City may be liable in damages, although, it has been held, it is not reduced to writing and signed. But a vote accepting a bid is not a contract where a provision is distinctly made for a future execution of a formal contract."

It will be seen that this author lays down the rule most positively that the awarding of a contract to a bidder is a final consummation of the same and that it is binding on both the parties. However, one might infer from a casual reading of the latter part of the quotation above that the awarding of the contract does not constitute a valid and binding contract if it is contemplated that the agreement already made is to be evidenced by a more formal written contract. That is not the meaning of the language used. But if it were the meaning intended to be conveyed by the last sentence quoted, it is not supported

by the authorities cited in the foot notes. We have examined each of these cases and the rule that must be deduced therefrom is this: That if it is understood and agreed that the contract shall not be binding until it is evidenced by a formal written instrument, the terms of which are to be agreed upon in detail, then in such instance the awarding of the contract is not binding until it is evidenced by a written instrument; but if the language used in the advertisement, in the bid, and in the award, are such as to indicate and evidence the matters and things as being agreed upon, then the award constitutes a valid and binding contract from the moment of such award, because the award is an acceptance of the proposition, and when made by the Mayor and Common Council of the City, it is irrevocable.

The appellees have insisted heretofore that the City Council had the power and authority to reconsider the award made to McCormick and to grant the contract to anyone else, which position, of course, we insist is incorrect. Appellees have referred to rule 12 of the City Council record, which is as follows:

“Rule 12: An action may be reconsidered at any time during the same meeting or the first meeting thereafter. No motion shall be reconsidered more than once, nor shall a vote to reconsider be reconsidered, but any member of the City Council who has voted in the affirmative shall have the right to move for a reconsideration.”

It is our contention that the record does not sufficiently show the adoption of these rules, but even if they were properly adopted, this rule 12 has not the force and effect contended for it by the appellees.

In support of their contention that the City Council after awarding these contracts to David McCormick had the power to reconsider the awards and to award the contract to The Conway Company, they rely on certain authorities to which we shall briefly refer.

Counsel first refers to Sec. 664 of Snyder's Compiled Laws of Oklahoma, 1909, which is as follows:

"The Mayor and Council shall have the care, management and control of the City and its finances and shall have power to enact, ordain, alter, modify or repeal any and all ordinances not repugnant of the laws of the United States and the laws of this State, as they shall deem expedient and for good government of the city, the preservation of the peace, and good order, the suppression of vice, and immorality, and the benefit of trade and commerce, and the health of the inhabitants thereof, and such ordinances, rules and regulations as may be necessary to carry such power into effect."

It is our contention that the reference to ordinances, rules and regulations have reference to the powers of the City in the exercise of its governmental functions, and there is no doubt but that the city or municipality has the power to provide all rules and ordinances for the management and control of the city, but when the City has entered into a solemn contract it cannot by a rule previ-



ously adopted pursue a course which will annul such contract. A city is bound by its contracts to the same extent as an individual, and the authority cited by counsel in support of their position in our humble opinion does not sustain their contention.

The test is as to whether or not the City has made a contract or as to whether or not the rights of third persons have intervened or attached. If so, the City has no power to vacate a resolution accepting a bid and awarding a contract.

The first authority relied on by appellees is McQuillen on Municipal Ordinances, Sec. 115, which is as follows:

“Where the charter of law applicable does not prescribe rules for the government of the proceedings of councils or municipal boards, etc., the body is at liberty to determine its own rules and proceedings from time to time as the occasion may require. Often times organic law provides that the council or representative body may adopt its own rules of action. However, the mere failure to conform to parliamentary usage will not invalidate the action when the requisite number of members have agreed to a particular measure. So the council may abolish, modify or waive its own rules, but of course it cannot disregard mandatory charter provisions. Hence, where an ordinance is enacted in compliance with the charter, it will not be held void because in its passage one of the parliamentary rules of the council was violated. Where a parliamentary question has been determined by the council, ordinarily the courts will not reverse such ruling. The action of municipal bodies exercising legislative functions should not be overthrown upon technical rules or strict construction of parliamentary law where the facts of such action can be gathered from the record;

however, it cannot be established from testimony of members as to their understanding of what was intended to be done. In reference to the action of county boards, the Supreme Court of Wisconsin has timely observed: 'It will not do to apply to the orders and resolutions of such bodies nice verbal criticism and strict parliamentary distinctions, because the business is transacted generally by plain men not familiar with parliamentary law. Therefore their proceedings must be liberally construed in order to get at the real intent and meaning of the body.' In like manner liberal construction is often applied to the action of councils in enacting ordinances."

It will be seen from this language used in the section referred to by counsel for appellees that the author had in mind rules and regulations for the passing of ordinances and for the administration of the affairs of the city in its governmental capacity.

The next case referred to is that of *Higgins v. Curtis*, 39 Kans. 283, 18 Pac. 207. This case has no reference to a contract awarded by a city council.

The syllabus of the case shows the question involved. It is as follows:

"Where a board of county commissioners rejects a report of viewers appointed by it to lay out and locate a public road, such board may at the same session reconsider its action by which said report was rejected, and may continue further action thereon to a future day of that session, without thereby losing jurisdiction.

"The board of county commissioners has the power to make reasonable rules and regulations for the government of its proceedings; and, in the absence of

proof to the contrary, a reconsideration of its action taken on a former day of the same session, on any matter before the board, will be presumed to have been done in conformity with its rules and regulations."

In this case the board of county commissioners rejected the report, and there is a vast difference between the rejection of all bids and the reconsideration of them and the acceptance of the bid and the award of the contract on it. Where all bids are rejected, the bidder has no vested right, but when his bid, based upon plans, specifications and notice, which set forth in detail everything pertaining to the work of improvement to be done, and he files his bid and the bid is accepted and the contract awarded, this constitutes a valid and binding contract, and the rights of the bidder have attached and the City Council can do no act then which will impair the obligation of its contract.

*This case, however, expressly laid down the rule that it was the duty of the party to be present and learn of the action of the board of county commissioners. The court said:*

"He knew that the report of the viewers would be made and it was his duty if he desired to appear before the board to ascertain, by the rules of the board, or through such other information as through inquiry to the board, he might have gained, when the report would be taken up; and if he failed to do this, he cannot afterwards complain that action was taken in his absence."

And so it was with McCormick. McCormick knew that the contracts were to be awarded on a certain evening.

Under the statute he was notified of such time and place, and McCormick and the other persons, pursuant to the notice given by the City, as required by the statute, of the time and place when the bids would be considered, were present and no further notice to him of the awards was necessary.

The next case cited by counsel for appellees is that of *Masters v. Holland*, 12 Kans. 17. This also involved the power of the board of county commissioners and was not the awarding of a contract by a city council or a municipality. The syllabus is as follows:

“In proceeding to open and lay out a public road, after the report of the viewers has been filed in the county clerk’s office the county commissioners are not compelled to take final action thereon at their first meeting, but may postpone such action until some subsequent meeting, without losing jurisdiction.

“The county board has power to make rules and regulations for the transactions of its business; and in the absence of proof to the contrary, any postponement will be presumed to have been made in conformity to those rules and regulations.

“A party having a matter in litigation before any tribunal must in order to protect his rights be present at every session of that tribunal at which the controversy may be determined until it is finally disposed of.

“One having a right to compensation for land taken for public use, must, to enforce that right, pursue the remedy provided in the statute, and, failing to do that, cannot enjoin the taking of the land on the ground that no compensation has been made.

“The fact that a road has no outlet or egress at one end, and that it primarily and principally benefits

only a single individual, does not destroy its character as a public highway, nor prevent the public from taking private property, for it."

It will be observed from the syllabus of this case that it has no bearing whatever upon the issues involved herein, *unless it be upon the point that it was the duty of McCormick to be personally present when the contract was awarded and that he was chargeable with whatever was done with reference to awarding the contracts at that time. McCormick was present, and knew when the awards were made to him.*

Appellees have also heretofore said that "Each adjournment had from the 4th day of November until the next regular meeting at which the award was finally reconsidered, was but a continuance of the regular meeting, and while counsel for the appellant did not raise any issue upon this question, we nevertheless desire to cite this court to the following authorities in support of that proposition."

And then counsel rely upon a number of authorities which they contend support their position, but this view is immaterial as the Mayor and City Council could not reconsider the awarding of the contract as such power is not given by the statute. The statute merely gives the Mayor and City Council the power to award the contracts and when the contract is awarded their power is exhausted. An examination of the record will show that after the awarding of the contracts to David McCormick on November 4th, and after the motion had been put and carried,

accepting the bids of David McCormick and awarding the contracts involved in this action to him, under the proceedings of November 4, 1908, and at the same meeting the following proceedings were had:

“Oklahoma City, Okla., Nov. 4, 1908.

“Moved by Mr. Helm, seconded by Mr. Workman, that the action of the council in awarding the contracts for asphalt paving at this meeting be rescinded. Motion lost by the following roll call vote: Ayes: Messrs. Workman, Helm and Land. Nays: Highley, Peshek, McWilliams, McDavie and Byers.”

Now, rule 12, which counsel invoke, provides as follows (see page 166 of record):

“A question may be reconsidered at any time during the same meeting or during the first meeting thereafter. No motion shall be reconsidered more than once, nor shall a vote to reconsider be reconsidered, but any member of the council who has voted in the affirmative shall have the right to move for a reconsideration.”

Now, at the meeting at which the awards were made as shown before, Mr. Helm moved to reconsider the awarding of the contracts. *This motion was voted down, and under the very rule on which counsel for the appellees rely, the Council could not reconsider the awarding of the contracts on November 9th. The Mayor and Council had by vote awarded the contracts. A motion was made to reconsider these awards. This motion was voted down, and this ended the matter, even under the rule cited by counsel, but we insist that when the City Council awarded the contracts and accepted the bids of McCormick, that this closed the*

matter, but the rule relied upon by counsel is very specific, and provides definitely that the action may be reconsidered at any time during the same meeting or during the first meeting thereafter. As stated before, at the meeting at which these contracts were awarded a motion was filed by Mr. Helm to rescind the awarding of the contracts, and this was voted down. This constituted a reconsideration of the awarding of the contracts at the meeting at which the awards were made. Then the rule says: "No motion shall be reconsidered more than once." The motion was that David McCormick being the lowest and best bidder that his bid be accepted and he be awarded the contracts for the paving of the above described streets, which was carried (see page 80 of printed record). And this same motion was made as to each of the contracts and the rule says: "*No motion shall be reconsidered more than once.*"

Now the motion to award the contracts to David McCormick was reconsidered in the motion of Mr. Helm to rescind the action of the Council in awarding the contracts, and then the rule provides "nor shall a vote to reconsider be reconsidered." It will be seen that the rule was intended to cut off the possibility of reconsidering the action of the Mayor and City Council more than once and that that reconsideration, no matter what the form of motion, should be at the same meeting or at the next following meeting. Even the rule does not support the contention of appellees.



The awards were reconsidered at the very meeting of the Council when the awards were made by the motion of Mr. Helm (page 89 of printed record). It was moved by Mr. Helm, seconded by Mr. Workman, that the action of the Council in awarding the contracts for asphalt paving at this meeting be rescinded. That motion was considered then and there and was lost.

The Supreme Court of New Jersey in the case of *State (Oakley et al., prosecutors) v. City of Atlantic City et al.* (N. J.), 44 Atl. 651, had occasion to determine the meaning of the word "reconsider" as applied to a case of this kind. The Statute of New Jersey (Gen. Stat. page 2143, Sec. 107) after defining the veto powers of a mayor, provided:

"If he (the mayor) approved it (the ordinance) he shall sign it; and if not he shall return it with his objections and file same with the clerk within ten days after he receives it and the aldermen or common council shall at their regular meeting thereafter order the objections to be entered at large on the journal, after which they shall proceed to reconsider the same, and if two-thirds of all the aldermen or common council elected shall then pass the same, it shall take effect as a law; but in every such case the votes shall be taken by ayes and nays and entered upon the journal."

The City Council had passed an ordinance which was vetoed by the Mayor and it was contended that the Common Council reconsidered the matter and passed it over the veto of the Mayor. Mr. Justice Lippincott delivered the opinion of the court, using the following language:

"No objection is made that the meeting was not

the proper meeting to consider the matter, or that the resolution overriding the veto did not receive a two-thirds vote of all the members. The sole objection is one of the meaning of the word 'reconsider' in the statute, and is that council did not declare in the resolution that they had proceeded to reconsider the matter. The matter had been considered by the adoption of the ordinance. The veto had been received and the mayor's objections ordered entered. It then took up the matter and discussed it, and then, by the requisite vote, resolved that: 'The ordinance stand, the mayor's objections to the contrary notwithstanding.' This was a reconsideration of the matter, and the only resolution or motion necessary was that the ordinance pass or stand notwithstanding the objections of the mayor. This, I think, is the usage customary in all legislative bodies acting under similar statutory provisions. The resolution or motion need not in terms declare that the body proceed to reconsider the measure. It need only to be taken up and considered again after the veto has been received. Besides, it has been held in this court that this term, 'reconsider,' in a statute of this character, is not given the artificial meaning which it may have acquired in strict parliamentary proceedings, but only the ordinary meaning, which is to think or consider the matter over again for the purpose of passing upon the matter on such second consideration."

Citing *Lake v. Ocean City*, 62 N. J. Law 160, 41 Atl. 427.

This is exactly what the City Council did when Mr. Helm filed his motion to rescind the awards made at that meeting and the motion was lost. Those voting ayes being Workman, Helm and Land; those voting nays being Highley, Peshek, McWilliams McDavie and Mr. Byers.

The case of *Lake et al. v. Ocean City et al.* (N. J.) 41 Atl. 427, was also a case involving the passage of an ordinance and the decision bases upon the meaning of the word "reconsider."

The Supreme Court of New Jersey, in determining the matter, used the following language:

"This *certiorari* brings up an ordinance of Ocean City by which it consented that certain persons named therein become a body politic for the purpose of supplying Ocean City and its inhabitants with water. The consent is qualified by sundry stipulations. By the return it appears that the ordinance, after its final passage by city council, was vetoed by the mayor and thereafter was adopted over the mayor's veto by a vote of five to one. This readoption is said by the prosecutor to be inefficacious, because the statute from which Ocean City derives its organic law provides that after the veto of an ordinance it shall be reconsidered, and 'if on reconsideration it shall pass the common council by a vote of two-thirds, it shall take effect notwithstanding such objection.' The argument upon this point is thus stated by counsel: 'The reconsideration of an ordinance makes it of no effect, and as if it had never been put upon its passage; and it must be taken up *de novo* and read and considered anew, accordingly.' This construction of the statutory law arises from, and is based upon the effect given by parliamentary usage to a vote 'To reconsider.' This use of the word is highly artificial, and the radical effect given to parliamentary proceeding is doubtless due to the withdrawal of support from a measure by one of its previous supporters, leading to a voluntary recall of the entire measure.

"There is nothing to lead to the importation of this significance into the construction of a statute dealing with the compulsory return of an ordinance under the veto power. The rule for statutory construction is

to give to words their ordinary rather than their extraordinary meaning unless constrained by the context.

“ ‘To consider’ means ‘to think with care’ upon a matter; hence, ‘reconsideration’ means thinking again upon it with care. All that the context suggests is that the occasion will direct the care according to the nature of the objections to the measure. The mode of this exercise of care is neither prescribed or implied; so that there is nothing that compels a reintroduction of the ordinance, or that prevents its repassage as it stood after its first and second readings, as was done in the present case.”

We say again that the rule contended for by counsel for the appellees has no application to the letting of a contract because when the contract is awarded it constitutes a consummated contract in which all of the parties have agreed in every detail. Rule 12 only applies to the passing of ordinances for the government of a city, *but even if it be held to apply in this case, the City Council had no power after they had passed upon the motion of Mr. Helm to rescind the awards, and after that motion was lost, to thereafter reconsider the awards. Under the rule itself the matter was closed, and the awards, even if the rule be held to apply, had already been reconsidered, the awards upheld by a majority vote of the Council and had become a binding contract and had passed beyond the power of the City Council to again reconsider.*

That the City Council had no power after accepting the bid and awarding the contracts to reconsider it is also sustained by the text writers upon this subject.

In the "Modern Law of Municipal Corporations," by John W. Smith, Vol. 1, page 748, in Section 746, the author says, under the heading "Acceptance of Bids:"

"After the acceptance of a bid, such acceptance cannot be reconsidered and revoked, for the reason that it has then become a contract."

Also, Mr. Hamilton, in his work on "Law of Special Assessments," at page 404 in Sec. 448, declares the same doctrine in the following language:

"A written proposal by the authorities for the requisite work, a written bid to do the proposed work, and a written acceptance of the bid by such authorities, together constitute a binding contract, unto which all oral negotiations between the parties are merged, and parol evidence is inadmissible to vary its terms."

Therefore, if those conditions constitute a valid and binding contract, it is self-evident that the City cannot reconsider the award without the permission of the contractor himself.

The same question arose in Pennsylvania in the case of *Campbell v. City of Philadelphia*, 10th Weekly Notes, case 221. In the above case that court considered the right of the City to reconsider a bid. The case is digested in "Century Digest," Volume 36, page 981, as follows:

"The Board of Health of the City of Philadelphia advertised for proposals for cleaning certain streets, stating that security must be given by the contractor in double the amount of the contract. A's bid was accepted by said board and the contract direct to be put in writing. A. tendered property security, but the

board inserted in the written contract a condition that certain payments were to be retained until the end of the year, and threatened unless A. would sign such contract, to re-advertise. A. prayed for an injunction to restrain such act and the injunction was granted."

And this must have been granted clearly upon the theory that when the award of the contract to A. was made, the city could not impose in the formal written contract any condition which was not clearly contemplated by the specifications, the bid and the award, and so here, under all the authorities, in conditions of this kind so far as we have been able to find when the City Council of Oklahoma City accepted McCormick's bids and awarded the contracts to him, that completed binding contracts between the City of Oklahoma City and McCormick and the City could not reconsider those awards.

The City Council could not reconsider the awards under Rule 12, if that applied, because they had already reconsidered it on motion and voted it down, leaving the award stand. They could not reconsider it because the accepting of the bids and the awarding of the contracts concluded the contracts for the making of the improvements between the City of Oklahoma City and David McCormick; and in addition to these reasons, which we insist are supported by all the authorities, we further contend that under the law authorizing the Mayor and City Council to let the contracts, they merely had power to pass upon the various bids opened and either reject all of them or to

accept the bids of one and award the contracts, making the record thereof, and when by a vote of the Council the contracts were awarded to David McCormick, the power of the Mayor and City Council in reference thereto was exhausted, because the statute does not give the Mayor and City Council power to reconsider an award after it has once been made, and as is shown by the record and not disputed by the appellees, the journal of the City Council shows the acceptance of the bids of David McCormick and the awarding of the contracts to him.

**Power of Mayor and City Council Exhausted by  
Awarding the Contract.**

In support of this position we direct the Court's attention to Section 725 of the Statute of Oklahoma, which has already been cited in this brief, and to the latter part of that section, which provides: That the Clerk shall publish a notice inviting bids, and also providing that said notice "*shall state the time when and the place where such sealed proposals shall be filed and when and where the same will be considered by the Mayor and Council.*"

This provision of the Statute is intended so that the bidders may be present when the bids are considered and the awards made and thus obviate the necessity, if it would otherwise be necessary, of giving formal notice to the successful bidder, and the Statute nowhere provides for notice to the bidder of the awarding of a contract to him, except the Statute just quoted.



Then this Section 725 provides that the notice to be issued by the Clerk shall be published a certain number of times in a paper of general circulation in the city, and then concludes: "*At the time and place specified in such notice, the Mayor and Council shall examine all bids received, and without unnecessary delay award the contract to the lowest and best bidder, who will perform the work and furnish the materials which may be selected, and perform all the conditions imposed by the Mayor and Council as prescribed in such resolutions and notice for proposals, which contract shall in no case exceed the estimate of costs submitted by the engineer with the plans and specifications, and the Mayor and City Council shall have the right to reject any and all bids and to re-advertise for other bids when any such bids are not, in their judgment, satisfactory.*"

The sole duty of the Mayor and City Council under this Statute is to award the contract and when the contract is awarded it has no further duty to perform in reference thereto. The question naturally arises—When is the contract awarded? The authorities are uniform in holding that the contract is awarded when the bid is accepted by the Mayor and City Council, the vote taken awarding the contract, and a record of such vote made by the City Clerk.

But before passing on from this Statute, let us call your attention to the language here used: "at the time and place specified in such notice, the Mayor and Council shall

examine all bids received, and without unnecessary delay award the contract to the lowest and best bidder, who will perform the work and furnish the materials which may be selected, and perform all conditions imposed by the Mayor and Council." How? "As prescribed in such resolutions and notice for proposals." And then the Statute says: "*which contract* shall in no case exceed the estimate of costs submitted by the engineer with the plans and specifications." "*Which contract*" clearly refers to the resolutions of the City Council, the notice published by the Clerk, etc., and has no reference whatever to any formal written contract.

Having accepted the bids of McCormick and awarded the contracts to him, the Mayor and City Council had no further power to act in the premises; and in support of this position we wish to direct the Court's attention to a few of the authorities.

We first direct the Court's attention to *American Lighting Company of Baltimore City v. McCuen* (Md.), 48 Atl. 352. This involved the letting of a contract for the City of Baltimore. The suit was for mandatory injunction, the bill was dismissed and the complainant appealed. The case was reversed and remanded. The court in commenting upon this question said:

"We think there can be no serious contention that the advertisement, specifications, the bid of the plaintiff, and 'the award of the contract' to it by the board of estimates, taken together, constitute a valid and com-

*plete contract.* The city needed certain materials furnished and labor to be done in connection with the lighting of the city, and the officer under whose charge and supervision this lighting is placed by charter, and in pursuance of its provisions, advertised for sealed proposals for furnishing the materials and doing the work in accordance with specifications filed in his office. Every fact necessary to constitute a contract will be found in one or the other of these written papers; and when the board of awards, composed of the mayor, the president of the second branch of the city council, the city register, the city comptroller, and the city solicitor, actually awarded the contract to the plaintiff to light the streets, etc., for a period of three years at their bid, the contract was as complete and legally binding *as if the more formal contract provided for by section 15 of the charter had been executed.* The negotiation was ended. The minds of the parties met, and nothing remained to be done but to prepare and execute the more formal contract as provided by the charter. Such being the situation, it is well settled, both upon general principle and authority, that the contract is complete. *Cheney vs. Transportation Line*, 59 Md. 557; *Wills vs. Carpenter*, 75 Md. 80, 25 Atl. 415; *Drummond vs. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707; *Sanders vs. Fruit Co.*, 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, and note. It does not seem to us that the fifteenth section of the charter, relied on by the defendants to sustain their contention on this branch of the case, has any force; for while it does provide that the formal contract to be executed is to be approved, 'as to its form, terms and conditions, by the city solicitor,' yet it could not be seriously contended that by virtue of this provision he could insert any terms and conditions not warranted by one or the other of the papers forming the contract that was awarded, or not authorized by the charter. Until the formal contract was prepared for execution, there was not only nothing in the negotiation nor in the written evidence of the contract to

show that the plaintiff contemplated surrendering the right to employ and discharge his own workmen, but the specifications prepared by the defendants in terms provide that the plaintiff 'must employ such number of men as is necessary to give the city the best service possible, who must be registered voters of the city of Baltimore, except those having in charge the management of said work and service.' "

In this case the charter of the City provided for a formal written contract, but the court held *that this formal written contract could contain nothing except that which was provided for or embraced within the plans, specifications, the bid and the award, and said that every fact necessary to constitute a contract would be found in one or the other of those papers and that when the board of awards particularly awarded the contract to the plaintiff to light the streets, etc., for a period of three years at their bid, the contract was as complete and legally binding as if the more formal contract provided for by section 15 of the charter had been executed.* The negotiations, the court said, were ended.

Again, in the case of *State v. Toole* (Montana), 66 Pac. Rep. 496, it was involved the letting of a contract for state supplies. The only difference is that in this case officers of the state were acting in letting the contract, instead of the mayor and council of the city, but as has been shown by the authorities, the mayor and city council in acting on behalf of the city in letting contracts of this character do not act in their legislative capacity; they act in

their business capacity, and in letting this kind of contract they are acting on behalf of the property owners and they are given this authority to let these contracts by the legislature of the state. The expense of this improvement is not paid by the city; it is paid by the abutting property owners by a special tax levied against the abutting property, and the legislature did not give the Mayor and City Council the authority to award a contract two or three times, but to award it once and once only, and when the award is made their power is ended. In *State v. Toole, supra*, the court says:

“Section 707 of the Political Code provides with reference to the state furnishing board: ‘The proposals received must be directed to the board, opened and compared by it at its office at twelve o’clock, noon, of the day specified in the advertisement, and the board must award the contract for furnishing such supplies, or any of them, to the lowest responsible bidder at such time.’ Section 709 provides, among other things, that any and all bids may be rejected, and the board may advertise again. *The board is a governmental agency possessing such powers and jurisdiction, and such only, as the law confers upon it.* In the examination, comparison and consideration of the proposals and in awarding the contract the board exercises its discretion. *The duty imposed is to award the contract to the lowest responsible bidder, unless the bids be rejected. This the statute commands it to do; and whenever, after a compliance with the statutory prerequisites essential to the valid acceptance of a bid, it has regularly awarded the contract, there springs into existence vested rights, which the board cannot destroy or impair. It cannot insert into the formal written contract any condition not consonant with the contract already made by virtue of the acceptance of the bid.*

Lighting Co. vs. McCuen (Md. not yet officially reported), 48 Atl. 352. In the absence of fraud, accident, and mistake, or other legal reason sufficient to render the acceptance void or voidable, the contract resulting therefrom *cannot* (unless by mutual consent) *be changed or annulled, nor may its obligations be impaired, by any act of the board.* True, such a contract is subject to the approval of the governor and state treasurer (Const., Art. 5, Sec. 30, Section 710, Pol. Code; State vs. Hogan, 22 Mont. 384, 56 Pac. 818; Same vs. Smith, 23 Mont. 44, 57 Pac. 449), *but this is a matter which does not concern the members of the board, nor give it the right to recall the acceptance and award. When it has thus regularly discharged the duty imposed upon it by the law, its jurisdiction in respect of awarding the contract is exhausted. Its discretion was exercised, and the power further to exercise it is gone.* We are aware that there is some conflict of opinion upon this subject, but we think that such must, in the nature of things, be the rule applicable to boards and officers clothed with specially delegated authority, and intrusted with limited jurisdiction. Support for these general observations may be found in People vs. Board of Contract and Apportionment of City of Albany, 2 How. Prac. (N. W.) 423; Same vs. Campbell, 72 N. Y. 496; State vs. York Co., 13 Neb. 57, 12 N. W. 817; Wren vs. Fargo, 2 Ore. 20; People vs. Gleason, 121 N. Y. 631, 25 N. E. 4; Boren vs. Commissioners, 21 Ohio St. 311; State vs. Barbour, 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65. *The action of the board in attempting to cancel the contract was void, unless a cause existed which the law recognizes as sufficient to invalidate the contract. We proceed to ascertain whether such cause appears."*

In the case at bar, as in the case of *State v. Toole*, "when it (the Mayor and City Council) has thus regularly discharged the duty imposed upon it by the law, its jurisdiction in respect to awarding the contract is exhausted

Its discretion was exercised and the power to exercise it is gone." And as was also said in that case, "the action of the board in attempting to cancel the contract was void."

The next case we wish to call the court's attention to is that of *Belser v. Hoffschneider* (Calif.), 38 Pac. 312. This case involved a reconsideration of an assessment made for street work. The assessment was made and the board then attempted to reconsider it. The court said such action was in its nature judicial. The court then commented as follows:

"The act being judicial, it would necessarily follow that the final judgment entered by the council could not be vacated. The procedure does not provide for granting a new trial or a rehearing. *Dorsey vs. Barry*, 24 Cal. 449. The general rule is that where special jurisdiction is conferred upon a court or board to determine certain specified controversies, and no provision is made for a review by such tribunal of its judgments, when it has once determined the matters its jurisdiction is exhausted. While the matter is still *sub judice*, no doubt the tribunal may reconsider its action, but when final judgment has been entered the board is *functus officio*. This matter is exhaustively considered, and the authorities upon the subject cited, in *People vs. Supervisors Schenectady Co.*, 35 Barb. 408."

Now there is no provision of the law, as heretofore stated, for the City Council to grant a rehearing or a reconsideration of the bids after it has once awarded the contract. The power granted in the case at bar is a special power and it is immaterial whether that power pertains to



the making of a public improvement, the canvassing of the returns of an election, appointing of persons to office, or any other act where the power conferred is a special power for the exercise of which there must be authority granted by statute; those exercising that power must act within the statute and cannot go beyond it.

In the case of *State ex rel. Coogan v. Barbour* (Conn.), 22 Atl. 686, was involved the appointment by the common council of a prosecuting attorney. The appointment was made and the council sought to reconsider the vote. The court said:

“We have said the appointment was made when the result of the ballot was ascertained and declared. Nothing more was required of the convention. Its will had been expressed in parliamentary and legal method, had been duly declared, and had become a matter of record. Declaring the result by resolution was unnecessary. No certificate or commission from the convention or its officers was required by law. Mr. Coogan’s right to the office vested at once, and he might, without further ceremony, accept and qualify. We do not wish to be understood as denying the power of the convention to correct errors and to nullify the effects of fraud. If there was a palpable error or fraud, or if the ballot for any cause was illegal, the convention might undoubtedly treat it as void, and proceed to another election. If we were to look only to the resolutions which passed, we might assume that there was an error in the ballot, and so give effect to the resolution. But the pleadings show that it was admitted that there as in fact no error or mistake. The mere declaration that there was an error when there was none, and the attempt to nullify the appointment on that ground, cannot be vindicated.

“These views are believed to be in harmony with the best and most carefully considered cases.”

The court says in this case that the appointment was made when the result of the ballot was ascertained and declared. The same thing is true in the case at bar. The contracts were concluded when by resolutions of the City Council the bids of David McCormick were accepted and by motion the contracts awarded him.

The next case we wish to cite is *Board of Law Library Trustees of Orange County v. Board of Supervisors of Orange County (Calif.)*, 34 Pac. 244. Under the law, the board of supervisors might establish libraries within their respective counties. In this particular case the board had acted and then sought to reconsider its action and vacate the decision. The court said: “After the board of supervisors of a county has voted that Act March 31, 1891, establishing law libraries, shall be applicable to such county it cannot evade the force and effect of such statute by repealing the adopting ordinance, since the county, after once coming within the provisions of the act, is there for all purposes, as fully and completely as if it had passed directly under the provision of the act at the date of its enactment.”

The Supreme Court of Louisiana, in the case of *State ex rel. Reynolds & Henry Const. Co. v. O'Kelly*, 18 So. Rep. 757, in an action to compel the levying of a tax by the Parish of Ouachita, said:

“It is argued that the decree of this court was not

absolute; that it left open, subject to the exercise of the discretion of the common council, whether the tax should be levied on the tax of 1889 or the tax of 1894; and that, having that discretion, neither the council nor anyone acting under its direct orders could be controlled in the exercise of that discretion. The court, in this instance, directed the council to ascertain certain facts, and, on such ascertainment to have a tax levied on the assessment of 1889 or 1894, as those facts would justify. The council acted upon the particular subject-matter thus referred to them, levied a tax of five mills upon the assessment rolls of 1894, and set on foot the machinery necessary for the collection of the tax. The sole matter left uncertain by our decree was thus fixed, and became thereafter substantially written into the decree. If it could be said that there was a discretion conferred upon the council in the selection of the particular years upon which the tax should be levied, that body had acted upon that discretion, performed the special duty with which it was charged, and therefore there was no attempt to control it in the exercise of its original discretion. *The question is whether, after having exercised the power or duty intrusted to it, it can subsequently reverse its action, and stay proceedings, because it may suppose that its duty was incorrectly performed.* In re Manchester, 5 Cal. 238. *We do not think it was charged with the duty of correcting its own mistakes, if mistakes it made.* There would be no end to litigation if such a doctrine were true. *When the council levied the tax it was ordered to levy, the subject-matter passed out of its hands. It had no further legal interest in the premises. It had performed the specific duty imposed upon it, and its connection with the levying of the tax ceased.* Darcantel vs. Refrigerating Co., 44 La. Ann. 644, 11 South. 239; State vs. Township Committee of Neptune, 20 Atl. 61.

Note that the court in this case said: "The question is whether, after having exercised the power or duty entrusted

to it, it can subsequently reverse its action and stay proceedings because it may suppose that its duty was incorrectly performed. We do not think it was charged with the duty of correcting its own mistakes, if mistakes it made." Then the court commented upon the fact that if the board could do that there would be no end to litigation. And then the court said: "When the council levied the tax it was ordered to levy, the subject-matter passed out of its hands. It had no further legal interest in the premises. It had performed the specific duty imposed upon it and its connection with the levying of the tax ceased." And so in the case at bar, when the Mayor and City Council awarded the contracts to David McCormick they did all that the law required them to do and they could not recall their action. McCormick was there, pursuant to the notice provided by law notifying the bidders to be present when the bids would be considered and the awards made. When those awards were made to him and recorded on the journal of the proceedings of the City Council, those awards became final and binding contracts both against McCormick and the City of Oklahoma City.

The next case we wish to cite is that of *Wm. J. Hadley v. the Mayor, Aldermen and Commonalty of the City of Albany*, 33 N. Y. 603. This involved the canvassing of the returns of an election. The law authorized the canvassing of the returns and the determining of the result of the election.

The council performed that duty and made its determination. The court said:

“The meaning, as it stands in the statute book, is, that the canvass shall be made at some meeting of the common council after the election. It was regular and legal to perform that duty at the first meeting, and this was what was done, as stated in the certificate. Having once been legally performed, the power of the council was exhausted. The board had no right to reverse its decision by making a different determination. The court was therefore right in rejecting the evidence which was offered.”

The Mayor and City Council in the case at bar determined to whom the contracts for the improvements should be awarded and as said by the Supreme Court of New York—“having been once legally performed (awarded) the power of the council was exhausted.”

The case of *State ex rel. Childs, Atty. Gen., et al. v. Wadhams* (Minn.), 67 N. W. Rep. 64, involved the appointment and confirmation of one as city assessor. The appointment was made and duly confirmed. The council attempted to reconsider the confirmation, but the court said “that the appointment of H. by the mayor with the advice and consent of the common council was a completed appointment and finality; that the common council had, by its confirmation, exhausted its power in such matters; and could not lawfully reconsider the question of such appointment and confirmation.”

The court, further discussing this situation, spoke as follows:

"We now come to the consideration of the question as to whether the common council of the city of Duluth duly confirmed the appointment of the relator Hawkes as city assessor, and whether the confirmation was final or revocable. There is no pretense that the mayor did not exercise his right of appointment in strict accordance with the legislative authority. Before this appointment could become fully consummated and complete, it must, however, be sanctioned by the advice and consent of the common council. This appointment was submitted to the common council, and upon motion duly made and seconded it was confirmed by a vote of nine yeas in favor and six nays against it, and declared carried by the presiding officer, and so recorded by the clerk. Nine members constituted a majority of the common council. *We find in the charter of the city of Duluth nothing more necessary to make this a consummated and complete appointment in every respect.* The method appears to have been parliamentary and legal, and free from fraud or trickery. It was the will of the people, fairly expressed through their legally constituted officials, and this will of the people, once fairly exercised and consummated, should not be thwarted by subsequent considerations, unless fully sustained by a rational view of the law. We are of the opinion that the appointing power in this case was completely exercised, and that such power was irrevocable by the common council. The exact method for creating the relator city assessor had been complied with, and we think he was thereby as fairly entitled to the office as though he had been elected to it by ballot at a regularly held election, and that, this right having once been conferred upon him, he could not be deprived of it by any subsequent reconsideration of the vote whereby his appointment was duly confirmed. 'A public office is a public trust,' and the incumbent has

to some extent a property right in it, which he holds, not subject to barter or sale but for the benefit of that political society of which he is a member. Of course, he is liable to be removed for cause, but it is not contended that the vote of confirmation was reconsidered or rescinded upon any ground which would constitute sufficient cause for removal, and, even if it had been upon such ground, the affirmative vote was insufficient, under the charter, for such purpose. It is to be observed that it was through these reconsideration proceedings of the common council, had at a subsequent meeting on the 30th of March, 1896, that the relator's appointment is assailed. But before this time the appointment had been promulgated in addition to being duly declared and entered of record, and notice thereof publicly proclaimed. The law does not require any certificate of appointment to be given, nor does any commission issue in such case. *Everything necessary to constitute a finality, and perfect it, had been done, and, the power of the common council having been exhausted at the time of the confirmation of the appointment, it had no authority to reconsider it.* In support of these views see *State vs. Phillips*, 79 N. E. 506, 11 Atl. 274; *State vs. Van Buskirk*, 40 N. J. Law 463. The allegation of mistake of Alderman Hansen in casting his vote, and in moving to reconsider, and his vote thereon, we regard as entirely immaterial, and express no other views upon it. Our conclusion is that the respondent, Samuel F. Wadhams, has usurped and unlawfully holds the office of city assessor of the city of Duluth, in the county of St. Louis, and State of Minnesota, and that the relator, Thomas B. Hawkes, is entitled to hold said office and to be put in possession thereof."

The court after stating that the appointment was made by the mayor, that it was submitted to the council and the appointment confirmed by a vote of nine to six, said:

"We find in the charter of the city of Duluth nothing



more necessary to make this a consummated and completed appointment in every respect."

The Statute of Oklahoma may be examined from beginning to end and nothing further will be found necessary to make the contracts in controversy valid and subsisting contracts beyond that which was done, viz.: the plans specifications, notices, resolutions, bids and awards. As the Statute provides for nothing further, under all of the authorities nothing further would be required: and it is the law that contracts of this kind must be let in conformity to the statute granting the authority. And the court then said: "Everything necessary to constitute a finality, and perfect it, had been done, and the power of the common council having been exhausted at the time of the confirmation of the appointment, it had no authority to reconsider it."

Another case we wish to call the attention of the Court to is that of *George P. Wren, Plaintiff in Error, v. Sheldon B. Fargo, Defendant in Error*, 2nd Oregon 19. The question involved was as to whether or not the board of county commissioners, after approving Fargo's bond as sheriff, would have the right to have the name of two of the sureties stricken therefrom. And in commenting upon this the court said:

"Now, had the commissioners any power or authority, on the next day in the absence of Fargo, and without his knowledge, to cause two of the sureties to come before them, and have their names erased from the bond, and order it disapproved, after they had once

acted upon it? We think not. Their powers and jurisdiction are limited by statute; and any official act of theirs, not thus authorized, is void. When the official bond of Fargo was presented, it was their duty to see that it was such an one as the law required, and if so, to approve it and cause their approval to be indorsed thereon, and it filed away among the public records; and the rights of the county became vested in the bond, and the sureties thereon responsible for the official acts of the sheriff; and after that, any act of the commissioners, interfering with those vested rights was without authority, and, therefore, void. We are of the opinion that there is no error in this cause for which it should be reversed, and *judgment is affirmed*."

The court asked the question—Had the commissioners the power to strike the names of his sureties from the bond without the knowledge and consent of Fargo? and the court said, "We think not," and then further said: "Their powers and jurisdiction are limited by statute, and any official act of theirs not thus authorized is void. When the official bond of Fargo was presented it was their duty to see that it was such an one as the law required and if so, to approve it and cause their approval to be endorsed thereon, and it filed away among the public records; and the rights of the county became vested in the bond, and the sureties thereon responsible for the official acts of the sheriff, and after that any act of the commissioners interfering with those vested rights was without authority, and therefore void."

The owners of the lots abutting the streets to be improved, which were included in these contracts in the case

at bar, were interested in these awards made by the Mayor and City Council of Oklahoma City to David McCormick, and the Mayor and City Council having exercised their discretion and awarded the contracts, their power under the statute was ended.

The case of *State v. Phillips* (Me.), 11 Atl. Rep. 274, involved the election of an assessor by the municipality of the city of Ellsworth. The aldermen of the city attempted to reconsider the election. The court said in substance that the statute gave that body the power to elect an assessor by ballot; that the election having been had, declared and recorded, the power of the aldermen was exhausted and their vote could not be reconsidered. The court said:

“We think the rulings of the court below correct. The election of assessors was required to be by ballot. While a municipal body having the power of election may set aside a ballot by which it appears that an election is made, for some irregularity or illegality before the election is declared (*Baker vs. Cushman*, 127 Mass. 105), we are aware of no authority which holds that, when the election by ballot is declared and entered of record, it may be reconsidered at an adjourned meeting on a subsequent day, and a new election had. When the aldermen balloted and declared the election of Baisdell, and it was recorded, *their power over the election to that office was exhausted, unless he should decline to accept it. He did not decline to accept, and the aldermen could not deprive him of the office, except by removal in the manner provided by law.*”

In this case, as in all of the others, the court said that the power of the aldermen over the election to the office

was exhausted and they could not reconsider it, and that the aldermen could not deprive the party elected of the office, except by removal in the manner provided by law. And so in the case at bar, the power of the Mayor and City Council of Oklahoma City was exhausted when the contracts were awarded to McCormick, and the only way that Mr. McCormick could be deprived of his rights under these awards and the contracts evidenced thereby would be to cancel the contracts for fraud or mistake or some cause recognized by law. No such cause existed. None was claimed. The action of the Mayor and City Council was arbitrary, unwarranted, in violation of the vested rights of McCormick, and in excess of the power conferred upon them by the statute. They had exercised the power conferred by law, had made the awards and let the contracts, and their power having been exhausted, the order reconsidering the awards and letting the contracts to The Conway Company was absolutely void.

**Agreement to Execute Formal Written Contract Immaterial  
Where Terms of Agreement Are Already Fixed.**

FOURTH PROPOSITION: *The mere fact that the specifications prepared by the City Engineer and the notice published by the City Clerk inviting bids by contractors, indicated that the parties to whom the contracts were awarded should sign a formal written contract, did not in any way relieve the award made by the Mayor and City Council from the force and effect of a completed and binding con-*

*tract for the making of such improvements. The contract was complete and binding from the moment the award was made and even if the notice provided for a more formal written contract, that would merely be a re-statement in a more formal way of the contract already entered into, and each of the parties were bound by the terms of the award and that which preceded it from the moment the award was made.*

The position taken by the Honorable Circuit Court of Appeals in its opinion is that the specifications, advertisements for bids and formal contracts prepared and regularly used by the City expressly contemplated a formal written contract. Then the court cites certain authorities to sustain its position, which, however, are not in point because they are controlled by local statutes which expressly require the formal contract after the award, and some of them even go so far as to prohibit recovery for the work unless such formal contract is duly signed by both the City and the contractor. Our statute contains no such provision. We will discuss these recitations later. Before doing so, however, we wish to direct the court's attention to an abundance of authority which clearly and conclusively establish, we think, the rule that if the entire conditions of the agreement are set forth in the resolutions, plans, specifications, notice to bidders, the bid and the acceptance and awards of the contracts, and those provisions are assented to by both parties, it constitutes a valid, binding

contract, although the parties agree to have a more formal written contract prepared and signed by them respectively.

The case at bar involves an Oklahoma contract, and the Supreme Court of this state has declared the law to be that where the parties have agreed upon the thing to be performed by them respectively it is a binding contract, notwithstanding an agreement to execute another contract.

The case of *Western Roofing Tile Co. v. Jones (Okla.)*, 109 Pac. Rep. 225, was an action involving the furnishing of certain roofing materials to be used in the construction of school buildings. The negotiations were carried on by correspondence between the parties. A formal contract was contemplated and provided for in the letters. All of the letters were set out in the petition. A demurrer was filed to the petition and sustained by the court, from which the plaintiff appealed. The contention in the Supreme Court was that there was no completed contract. The contention of the defendant is clearly stated by the court in its opinion, wherein it said:

“Counsel for defendant takes the position in his brief that no completed contract was entered into between the parties due to the fact, as it claims, that plaintiff was to make out a new contract in duplicate, sign the same, and send it to the defendant, and in view of the fact that this had not been done, that no enforceable contract existed between the parties; that an acceptance of a contract to be effectual must be identical with the offer and unconditional; that there was no communication between the parties upon which the claim that a contract was entered into could be sustained; that the petition, when construed

in connection with the admitted writings of the parties, stated no contract upon which plaintiff could recover; and that no error was committed by the court in sustaining the demurrer.

“The inherent terms of the contract sought to be enforced in this case are not in controversy. The question presented simply is: Did the defendant enter into it?”

So in the case at bar, there is no dispute as to the terms of the resolutions of the City Council, the plans, profiles, specifications, notices, bids or awards; nor is there any contention that either party did not intend the legal effect of those instruments and proceedings of the Council. In brief, the City asked McCormick, with other contractors, what he would make these improvements for and McCormick stated in his bid unconditionally the amount and the City unconditionally accepted his bid and awarded him the contracts. It was understood that a mere formal contract would be executed by the parties, but nowhere was there any intimation that the contract for the work should not be considered concluded until the formal contract should be signed. All matters were assented to by both parties, but the City desired the formal contract and so provided; but such contract was not made a condition precedent to the final agreement of the parties. The Oklahoma Supreme Court in commenting upon the fact in the case of *Western Roofing Tile Co. v. Jones, supra*, said:

“The rule in reference to the question here presented is that, where parties desire to make the reduction of



any agreement into which they have entered to writing and its signature a condition precedent to its completion, it will not be a contract until this is done, and this is true although all the terms of the contract have been agreed upon. But where parties have assented to all the terms of the contract, and they are fully understood in the same way by each of them, the mere reference in conjunction therewith of a future contract in writing will not negative the existence of a present contract. The question involved is always one of intention. 7 Am. & Eng. Ency. of Law, p. 140; Hammon on Contracts, p. 85; Wald's Pollock on Contracts (3d. Ed.), p. 46; Thomas v. Dering, 1 Keen 729, 48 English Reports (reprint) 488; Mississippi & Dominion Steamship Co. v. Swift et al., 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545; Allen et al. v. Chouteau, 102 Mo. 309, 14 S. W. 869; Blaney et al. v. Hoke, 14 Ohio St. 292; Montague et al. v. Weil & Bro., 30 La. Ann. 50; Hodges v. Sublett, 91 Ala. 588, 8 South. 800; Wharton v. Stoutenburgh, 35 N. J. Eq. 266, are all authorities which sustain the principle laid down above. In the citation from Wald's Pollock on Contracts the author says: 'It is settled law that a contract may be made by letters, and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain.' And this is supported by an extended note containing citations of American authorities.

"The rule stated by Mr. Hammon, in his work on contracts, is that 'if the parties finally agree upon all the terms proposed, and intended to become immediately bound, there is a complete contract, although they further intend to embody the terms of the agreement in a writing to be formally executed by them.' "

Later in this brief we will show the court that nothing new or additional was to be put into the formal contract in the case at bar.

Upon this point we wish to further direct the court's attention to the case of *American-Pacific Construction Company v. Modern Steel Structural Company*, 211 Fed. Rep. 849, decided by the Circuit Court of Appeals for the Ninth Circuit on March 9, 1914. In this case drawings and specifications for the construction were furnished. A proposal to do the work at a definite price was made and accepted. It was further provided, however, that certain drawings from the general plans were to be drafted by the architect and constitute a part of the contract. These drawings were not made, although clearly agreed to be made. It was the contention in that case as here that inasmuch as these drawings were contemplated as a part of the contract that the contract was not consummated until they were furnished and assented to by the respective parties. The court, however, did not agree with this position and it held that inasmuch as the plans and specifications, the bid and the acceptance to that bid fully described the work to be performed that they constituted a valid and binding contract. The drawings which were to be furnished, of course, could only be in harmony with the plans and specifications, the proposal and acceptance, and so it is with the case at bar—the resolutions, the plans, specifications, notices published, bids and the awards of the contracts on those bids described the character of material to be furnished and the work to be performed. Not a single brick or item was omitted therefrom. Nothing could be

added by the subsequent written contract except to reduce the contract already made to a simpler form as a mere matter of convenience.

In the case of *Thomas B. Whitted & Co. v. Fairfield Cotton Mills* (Circuit Court of Appeals, Fourth Circuit), 210 Fed. Rep., p. 725, the court said:

“Although the parties to a verbal agreement, the terms of which are mutually understood and agreed upon, contemplate that it is to be reduced to writing and signed; yet, if the understanding is that this is simply to be done as a memorial of the agreement, it is binding notwithstanding it is never put in writing.”

Again, in the case of *Jenkins & Reynolds v. Alpena Portland Cement Co.* (Circuit Court of Appeals, Sixth Circuit), 147 Federal Reporter, p. 641, the court in the third paragraph of the syllabus said:

“Though parties to a verbal agreement contemplate that it is to be reduced to writing and signed, yet if the understanding is that this is to be done simply as a memorial of the agreement, the contract is binding, notwithstanding it is never put to writing.”

Then on page 655 in the body of the opinion, the following language is used:

“Now it is well settled that though the parties to a verbal agreement contemplate that it is to be reduced to writing and signed, yet if the understanding is that this is to be done simply as a memorial of the agreement it is binding, notwithstanding it is never put to writing. In the case of *Pratt vs. Railroad Co.*, 21 N. Y. 308, Judge Selden said:

“A contract to make and execute a certain written

agreement, the terms of which are mutually understood and agreed upon, is in all respects as valid and obligatory, where no statutory objection interposes, as the written contract itself would be if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of the contracts were in all respects definitely understood and agreed upon; and that a part of the mutual understanding was that a written contract embodying these terms should be drawn and executed by the respective parties—this is an obligatory contract, which neither party is at liberty to refuse to perform.' ”

In the case of *Blaney & Morgan v. David T. Hoke* (Ohio), 14 Ohio State 292, the court announced the doctrine for which we here contend. Brinkerhoff, J., speaking for the court said:

“To enable the plaintiff to recover the jury must be satisfied, from the evidence, that there was a complete contract between him and the defendants. In order to constitute such a contract, their minds must have met and agreed upon all of the points intended by either the plaintiff or defendants to be comprised therein.” • • •

In the case at bar, as heretofore pointed out, every detail was agreed to between the City and McCormick and every portion of that agreement was in written form and there was no intimation in the plans, specifications, resolutions, notices, bids or acceptance by the City Council to the effect that the contract evidenced by those instruments should not take effect until the formal written instrument was executed by the respective parties.

The court in further discussing the law applicable to the case of *Blaney and Morgan v. Hoke*, *supra*, said:

“The contract in question between the parties, not being one which the statute of frauds requires to be in writing, if it were in all other respects complete, would be none the less a good and binding contract, from the *mere* fact that it was understood between the parties that the contract was subsequently to be in due form reduced to writing and signed by them. That is, in effect, held in the case of *Thomas v. Dering*, 15 E. Ch. R. (1 Keen) 729. In that case the plaintiff wrote to the defendant offering him a certain price for a landed estate which the defendant had offered for sale. The defendant replied by letter, accepting the offer. On a bill for specific performance the master of the rolls held the contract to be complete, although it distinctly appeared, from the correspondence, *that the future execution of a more formal agreement in writing was contemplated by the parties*. The contract was there made through the medium of a correspondence by letter; but that does not alter the principle of the case, when applied to one not within the purview of the statute of frauds. It is true, the doctrine of that case will hold good only where the agreement was in all other respects complete, and in the absence of any understanding between the parties, that it should not be complete until formally executed in writing.”

In the case of *American Lighting Company of Baltimore v. McCuen* (Md.), 48 Atl. 352, the Supreme Court of Maryland expressly held that an agreement to subsequently enter into a formal written contract did not take away the binding force of the contract evidenced by advertisement, bid and the award. The court states the facts in that case as follows:

“The American Lighting Company being a corporation, incorporated under the laws of this state, filed

a bill in the Circuit Court No. 2 of Baltimore City for a mandatory injunction. The bill alleges that the superintendent of lamps and lighting in the exercise of authority conferred upon him by the charter of the city, advertised in November last, according to the provisions of Sections 14-15 of the charter (Acts 1898 c. 123) for sealed proposals for lighting the streets for the period of three years from March 1, 1901, and that he at the same time prepared specifications for the work for which proposals were invited; that the plaintiff made a written bid for said work, and, as required by the terms of the charter, filed it with the city register and the said superintendent of lamps; and that the contract for doing said work was duly awarded to the plaintiff by the board of awards. Section 15 of the city charter provides that 'the successful bidder for city work shall promptly execute a formal contract, to be approved as to its form, terms and conditions by the city solicitor.' In accordance with this section a contract was prepared and submitted to the plaintiff to be executed, but it refused to do so upon the ground that the city solicitor had introduced in the contract the following paragraph: 'Second. That the said American Lighting Company of Baltimore City does upon its part agree that all employees necessary to carry out and perform the requirements of said specifications shall be appointed by the superintendent of lamps and lighting, who shall have reserved unto him the right and power to remove at any time any of said employees, as well, also, as the power to appoint all of said employees for the purpose of the proper performance of this contract.' This right to appoint and discharge employees of the contractor is based upon the provision of Secs. 28 and 204 of the charter. The superintendent of lamps and the mayor having refused to execute a contract without incorporating therein the objectionable provision above quoted, the plaintiff filed this bill, so alleging and praying that a mandatory injunction be issued, commanding the superintendent to execute and deliver a contract with the plaintiff in the form to be ap-

proved by the law department of the City of Baltimore, without containing the above clause. The superintendent of lamps and the city answered, and, without stating in detail the allegations of the answer, it is sufficient to say that they base their claim to appoint and discharge the employes of the plaintiff upon the provisions of Sections 28 and 204, above referred to, and upon the contention that there was no valid binding and subsisting contract between the plaintiff and defendants when the contract was awarded to the former by the board of awards, but that it was necessary for the completion and consummation of the proposed contract that the 'formal contract,' provided for in Section 15 of the charter should first be actually executed by the plaintiff. A *pro forma* decree was passed dismissing the bill and the plaintiff had appealed."

Upon this state of facts, Mr. Justice Fowler, speaking for the court, said:

"We think there can be no serious contention that the advertisement, specifications, the bid of the plaintiff and the 'Award of the contract' to it by the board of estimates, taken together, constitute a valid and complete contract. The city needed certain materials furnished and labor to be done in connection with the lighting of the city, and the officer under whose charge and supervision this lighting is placed by the charter, and in pursuance of its provisions advertised for sealed proposals for furnishing the materials and doing the work in accordance with specifications filed in his office. Every fact necessary to constitute a contract will be found in one or the other of these written papers; and when the board of awards, composed of the mayor, the president of the second branch of the city council, the city register, the city comptroller and the city solicitor, actually awarded the contract to the plaintiff to light the streets, etc., for a period of three years at their bid, *the contract was as complete and legally binding as if the more formal*



*contract provided for by section 15 of the charter had been executed. The negotiation was ended. The minds of the parties met, and nothing remained to be done but to prepare and execute the more formal contract as provided by the charter. Such being the situation, it is well settled, both upon general principle and authority, that the contract is complete. Cheney v. Transportation Line, 59 Md. 557; Wills v. Carpenter, 75 Md. 80, 25 Atl. 415; Drummond v. Crane, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707; Sanders v. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, and note. It does not seem to us that the fifteenth section of the charter, relied on by the defendants to sustain their contention on this branch of the case, has any force; for while it does provide that the formal contract to be executed is to be approved, 'as to its form, terms, and conditions, by the city solicitor,' yet it could not be seriously contended that by virtue of this provision he could insert any terms and conditions not warranted by one or the other of the papers forming the contract that was awarded, or not authorized by the charter. Until the formal contract was prepared for execution there was not only nothing in the negotiation nor in the written evidence of the contract to show that the plaintiff contemplated surrendering the right to employ and discharge his own workmen, but the specifications prepared by the defendants in terms provide that the plaintiff 'must employ such number of men as is necessary to give the city the best service possible, who must be registered voters of the City of Baltimore, except those having in charge the management of said work and service.'"*

It will be observed that the court in this case used this plain and positive language: "*We think there can be no serious contention that the advertisement, specifications, the bid of the plaintiff and the award of the contract to it by the board of estimates, taken together constitutes a valid*

*and complete contract."* And it will also be observed that it was expressly provided that the formal written contract should be executed but the court said: That did not change the fact of the existing contract by the award and those things which preceded it, and in this case, as in the case of *Jas. W. Harvey v. United States*, 15 Otto. 671, it was held that the advertisement, specifications, bid of the plaintiff and the award of the contract by the city constituted the real contract *and that the city could not insert provisions in conflict therewith to the detriment of the bidder.*

In this case the contractor refused to assent to changes from the contract as evidenced by the award, the bid and those things which preceded it. In the *Harvey case* the change was in the formal written contract, but the court said it must give way to the specifications, the bid and the award.

And this rule obtains whether it be a municipality or an individual, and the municipality in making its contract as has been heretofore shown by the authorities cited in this brief stands upon an equal footing with an individual.

In the case of *People ex rel. Isaac Lunny, Appellant, v. Allen Campbell, Commissioner, etc., Respondent*, 72 N. Y. 496, Justice Miller considered in a case for mandamus some of the questions involved in this case. The commissioner of public works of the City of New York, in pursuance of a resolution and ordinance of the common coun-

cil, advertised for proposals for street improvements. Relator was the lowest bidder and his proposal was accepted. The court denied the writ and said: "No rule is better settled by the decisions of the court than that in such a case mandamus will not lie." The appeal was dismissed. The court said:

"The affirmance of the order is based in part upon the ground as we are authorized to infer from the opinion, that if the right of the relator was absolute to the contract, as claimed, that he has a remedy at law, and was not in strictness entitled to a mandamus. This position we think is well founded. There appears to be no question but if the proceedings were all regular and conducted according to law as is asserted and the relator has in all respects conformed to the city charter, that he has a right of action against the city for all damages which he has sustained by reason of the refusal of the commissioner to execute and carry out the contract."

In the case of *Lynch v. Mayor, etc., of City of New York*, 37 N. Y. Sup. 798, the Supreme Court, appellate division, first department, held that a contract was entered into by the advertising for bid, the filing of the bid, and the making of the award and *that it was not affected by an arrangement or agreement that a subsequent formal contract should be executed*. The action was brought to recover damages sustained by the plaintiff in consequence of a refusal of the defendant to execute and sign a certain contract or agreement whereby the plaintiff was to perform certain work in the construction of a sewer from Franklin Avenue to 167th Street in the City of New York. The commissioner

of street improvements of the 23rd and 24th wards had advertised for bids for the construction of this sewer. The plaintiff made a bid which was received by the commissioner and the bid of the plaintiff with the others was opened as required by law, and on the 26th day of November, the plaintiff received a letter from the secretary of the commissioner of street improvements, by which the plaintiff was notified that his proposal for constructing the sewer, being the lowest, the contract for the same had been awarded to him and that it would be necessary for him to appear and qualify before the comptroller at his office, and the commissioner transmitted the plaintiff's bid to the comptroller of the City of New York. The question presented was as to whether or not this action on the part of the commissioner of street improvements of itself created a binding contract between the city and the plaintiff for which the city was responsible in damages if the defendant refused to make the contract to complete the work. It also appeared from the record that on March 30th, six days after the letter awarding the contract to the plaintiff had been sent, the commissioner notified the plaintiff by another letter that his proposal to build the sewer had been rejected on account of irregularity of the bid and consequently the defendant city refused to execute the contract with the plaintiff and the plaintiff brought his action. Judgment was in favor of the plaintiff and the defendant city appealed, which judgment of the lower court was

affirmed. The court in discussing the questions involved in the case used the following language:

“The question here is whether a notice by the head of a department to the lowest bidder that his proposal is the lowest, and that the contract had been awarded to him, precluded the head of a department, before the actual execution of the contract, from rejecting all the bids under the public notice which has been duly advertised. In other words, whether the award of a contract by the commissioner to the lowest bidder before any contract has been executed under it, creates a binding contract on behalf of the city to subsequently execute the contract, for a breach of which the city is liable for damages. Let us look for a moment at the rights and obligations of each of the parties to this proposed contract immediately after this communication awarding the contract to the plaintiff was received by him. The city, by its duly authorized officer, had advertised for bids or proposals to do certain work that the City was authorized to do. Annexed to that proposal was a contract which had been settled by the counsel to the corporation as an act of preliminary specification to the bid or proposal. The plaintiff had made a bid offering to do the work for a price named, and it is not disputed that he was the lowest bidder. Whether or not the contract should be awarded to him was then to be determined by the commissioner. The statute imposed upon the commissioner a specific duty. That was, first, to determine whether or not it was for the interest of the City to reject all bids. If he determined not to reject all bids, he was then required, without the consent or approval of any other department or officer of the city government, to award the contract to the lowest bidder.

“Consolidated Act. Sec. 65. Upon that award being made, the lowest bidder was bound to execute the contract, and to furnish sureties to secure the faithful performance of the contract, who, in addition to the

justification and acknowledgment of the bond, should be approved by the comptroller. If the lowest bidder neglected or refused to accept the contract within five days after written notice that the same had been awarded to his bid or proposal, or if he accepted, but did not execute, the contract, and give the proper security, it should be re-advertised or re-let as above provided. See Consolidation Act, Sec. 64. But, in addition to that, by Section 65 of the Consolidation Act, it was provided that each bidder must deposit with the department or officer a certified check drawn to the order of the comptroller, or money to an amount not less than three nor more than five per cent of the amount of the bond required by the department or officer for the faithful performance of the work proposed to be done or supplies to be furnished; and, if the said lowest bidder shall refuse or neglect, within five days after due notice that the contract has been awarded, to execute the same, the amount of the deposit made by him shall be forfeited to and retained by the said City as liquidated damages for such neglect or refusal. Thus we see a system provided by which work to be done is to be by contract to be entered into by the appropriate heads of departments, to be founded on sealed bids or proposals, made in compliance with public notice, duly advertised. The head or a department, unless he shall deem it to be for the best interest of the City to reject all bids, shall, without the consent or approval of any other department or officer, award the work to the lowest bidder; and when this award is made, the lowest bidder is bound to execute the contract, or forfeit to the city a sum of money which he is required to deposit with the officer at the time of the submission of his bid. Upon the determination by the head of the department that it is not for the interest of the City to reject all bids, he is bound to award the contract to the lowest bidder; and, when that award is made, it seems to be clearly the intention of the statute to bind both the lowest bidder and the city to sign the contract. *The penalty for a violation*

*of that obligation by the lowest bidder is fixed by the statute, namely, a forfeiting of the amount of money that the bidder was required to deposit at the time of the submission of his bid; and no penalty is affixed for a refusal of the City to perform its part of the contract, namely, to execute the contract that had been settled by the corporation counsel as an act of preliminary specification to the bid, we think it follows that the City was liable for the damages sustained by the lowest bidder for the refusal to execute the contract.* This view, we think, is sustained by the case of *People vs. Campbell*, 72 N. Y. 498, where Miller, J., in delivering the opinion of the court, says:

“ ‘This position, we think, is well founded, and there appears to be no question that, if the proceedings were all regular and conducted according to law, as is asserted, and the relator has in all respects conformed to the provisions of the city charter, that he has a right of action against the City for all damages which he has sustained by reason of the refusal of the commissioner to execute and carry out the contract.’ ”

It will be observed in this case that the future formal contract was to be entered into and the notice provided a penalty “if the lowest bidder neglect or refuse to accept the contract within five days after written notice, that the same had been awarded to his bid or proposal, or if he accepted and did not execute the contract and give the proper security, it should be re-advertised and re-let as above provided.”

The Supreme Court of New York again held in the case of *Beckwith v. City of New York*, 106 N. Y. Sup. 175, that the award of the contract fixed the status of the parties *notwithstanding it is understood that a subsequent*



*written formal contract was to be executed by them.* This case involved the letting of a contract for furnishing, delivering and laying water mains in certain streets in the Borough of Richmond. The court said:

“The appellant relies on the following provisions of section 149 of the charter (chapter 466, p. 50, Laws 1901), to-wit:

“‘No contract hereafter made, the expense of the execution of which is not by law or ordinance, in whole or in part, to be paid by assessments upon the property benefited, shall be binding or of any force, unless the comptroller shall indorse thereon his certificate that there remains unexpended and unapplied, as herein provided, a balance of the appropriation or fund applicable thereto, sufficient to pay the estimated expense of executing such contract, as certified by the officer making the same.’

“Such certificate was never made, for the reason that the contract was never presented to the comptroller for his certificate; said commissioner having rejected the bids after awarding the contract as aforesaid. Section 419 of the charter contains the following provision:

“‘If a borough president or the head of a department shall not deem it for the interests of the City to reject all bids, he shall without the consent or approval of any other department or officer of the City government, award the contract to the lowest bidder, unless the board of estimate and apportionment by a three-quarter vote of the whole board shall determine that it is for the public interest that a bid other than the lowest should be accepted’

“It is not claimed that the board of estimate and apportionment so determined, and it is plain that, having awarded the contract, the commissioner had no power to reject all bids. *Pennell vs. Mayor*, 17 App.

Div. 455, 45 N. J. Supp. 229. The commissioner, however, could not be compelled by mandamus to execute the contract for the reason that the plaintiff had a remedy in the present action. *People vs. Campbell*, 72 N. Y. 496. It can be no defense that the comptroller never did what he was prevented from doing by the breach complained of. The plaintiff proved, and it was not disputed, that there were funds, applicable thereto, sufficient to pay the estimated expense of executing the contract, and, but for said wrongful rejection of bids, the comptroller would have been compelled by mandamus to make the certificate in case of a refusal, for his duty was purely ministerial. This case is controlled by the decision in *Lynch vs. Mayor*, 2 App. Div. 213, 37 N. Y. Supp. 728; for, while the appellant seeks to distinguish that case by asserting that the present statute materially differs from the statute in force when the contract involved in that case was awarded, a comparison of said section 149 of the charter and section 123 of the consolidation act (Chapter 410, p. 31, Laws 1882) disclosed that, so far as the question now under consideration is concerned, there is no material difference between the two. Moreover, as we view it, the opinion of the court in *Lynch vs. Mayor* correctly states the law applicable to this case, and, while the court in that case did not discuss said section 123 of the consolidation act, now superseded by said section 149 of the charter, they evidently deemed it, as we do, immaterial. Had the contract been executed the provision quoted from said section 149 would apply, and said contract would have no binding force until the certificate was made.

“The plaintiff was permitted to recover the sum of \$30,231.09, the prospective profits which his proof showed were lost, and the sum of \$2,052.50 for the following expenditures, to-wit: Cost of pipe purchased \$975.50; the cost of two valves, \$277.00; cost of bond, \$350.00; expense of formulating bid, \$150.00, and cost of plans, \$300.00. The prospective profits lost were proper elements of damage under the leading case

of *Masterson vs. Mayor*, 7 Hill 61, 42 Am. Dec. 38, which both sides rely upon. These profits were properly arrived at by deducting what it would cost to execute the contract from the contract price, and it may be conceded that the plaintiff could recover in addition to that any expense to which he was put and from which he could derive no benefit by reason of the defendant's breach, but it was not shown that the plaintiff would lose the cost of the pipe and valves."

The question was also considered by the Supreme Court of California in the case of *Argenti v. City of San Francisco*, 16 Cal. 256. The contract in this case involved the paving, planking and laying of sewer on a portion of Mission Street in the City of San Francisco, the same to be paid by abutting property holders, as was true in the case at bar. The contract was awarded upon advertisement for bids, plans and specifications, etc. The opinion was written by Chief Justice Field, who afterwards became an associate justice of the Supreme Court of the United States. The court in discussing the matters said:

"It will be thus seen that the charter vested in the common council the authority to make the improvements in question, and directs the mode in which the intention to make the same shall be indicated, the conditions upon which the work shall proceed, and the parties to whom the contract shall be awarded; and the general ordinance of November, 1852, designates the officer under whose supervision, on behalf of the City, the work shall be done. In the present case, the ordinance of July 21st, 1853, sufficiently indicates the intention of the common council to make the improvements; it states the work to be done, and the character of the grade, it called for proposals and directs the

award of the work; and the charter determines the party to whom the award shall be made. *The ordinance was duly published, the advertisement duly made, the proposals received, and the work awarded. The contract was thus complete on both sides, and no protest having been interposed, it only remained to carry the same into execution.* It is, therefore, of no moment, in my judgment, whether or not the street commissioner had authority to bind the City by the particular written instrument embraced in the record. *The parties were mutually bound by the proceedings previously taken*—the contractor in accordance with his bid and accompanying specifications, which were accepted—the city to pay him either directly, or to collect the amount by assessment upon the property, and transfer it to him. The drawing up of a formal contract, specifying its terms, is the usual proceeding upon the acceptance of a bid for a contemplated improvement; and, for many reasons, should be insisted upon, especially to avoid dispute as to the extent and details of the work. This can, however, only be a matter of moment, when it is attempted to enforce the contract against the contractor, or to hold him responsible for its imperfect fulfillment. It is of no consequence, where there is no complaint on the part of the city as to the performance of the contract.”

Mr. Justice Field in this opinion refers to the fact that the ordinance was duly published, the advertisement duly made, the proposal received and the work awarded, and then says: “*The contract was thus complete on both sides,*” and we insist that the contracts were complete when the Mayor and City Council awarded this work to David McCormick and neither had the power without the consent of the other to avoid the fulfillment of the contract, that is, to impair the obligation thus mutually created. Further on

in the opinion the court says after commenting on this condition:

"It follows, from the views I have expressed, that the acceptance of the proposals of Barton by the street commissioner and the committees of the two boards, under the direction of the ordinance of July 21st, 1853, and those of Swain by the city in proper form, converted what were previously mere propositions of the city into contracts, perfect in all their parts, binding alike upon the city and the contractors."

And again further on the learned Chief Justice, to the end that his position may not be misunderstood, defines his position with more particularity in the following language:

"But I place my concurrence in the judgment heretofore rendered in this case upon the validity of the contracts with the City, which were completed by the acceptance of the proposals of the contractors, and under the primary liability of the City for the work performed thereunder. I have been thus explicit, because I do not consider that, independent of such contracts, any liability would attach to the city for the improvements of the streets."

In the case of *Wills v. Carpenter* (Md.), 25 Atl. 415, it was contemplated that a formal written contract would be entered into. The contract it was claimed was made by correspondence with the understanding that a formal written instrument should be ultimately made by the parties. The question presented was as to whether or not the letters constituted a contract with the agreement to enter into a subsequent written contract, and the doctrine was recognized that if it did, then the mere fact that they had agreed

to reduce their contract in a more formal way to writing would not of itself avoid the terms of the contract, as evidenced by the letters, if from them it could be seen that the terms of the agreement were set forth and it was the intention of the parties to be bound thereby. The court in discussing the matter said:

“Where the terms disclosed by the letters are clear, unambiguous, and explicit, they cannot be defeated or evaded by the mere superaddition of a provision looking to the subsequent preparation of a more technical contract covering the same subject-matter. *Bonnewell vs. Jenkins*, 8 Ch. Div. 70. In a word, where the correspondence itself constitutes an agreement capable of being legally enforced, a proposal for a more formal contract will not be treated as superseding that agreement.”

The court expressly states that if the correspondence itself has been such as to constitute an agreement capable of being legally enforced a proposal or agreement between the parties for a more formal contract would not be treated as superseding the original agreement.

To the same effect is the case of *Drummond v. Crane et al.* (Mass.), 35 N. E. 90. This was an action by Michael J. Drummond against Marie L. Crane and another, administratrix and administrator of the estate of Cyrus R. Crane, deceased, on a contract. The court found for the plaintiff and assessed his damages. The question was as to whether or not there was in fact a contract and as to whether or not it would be affected by reason of an agreement to

enter into a subsequent written contract. The court, speaking through Mr. Justice Holmes, stated:

“The considerations which we have put forward are not affected by the fact that the contract sued upon contemplated another more formal contract. That is merely an additional wheel in the machinery. Nor does it matter that the second contract would be made with another party.”

In the case of *West Chicago Park Commissioners v. Carmody*, 139 Ill. App. 635, the court held that the advertisement for bids, the preparation by the city of plans and specifications, on which bids should be based, the filing of the bid, and the awarding of the contract by the City Council constituted a valid and binding contract, *notwithstanding the notice provided that the successful bidder should enter into a subsequent written contract*. In that case Carmody was the successful bidder and pursuant to the requirement of the notice and the law, he deposited \$500.00 as a forfeit. The city withheld this \$500.00 and claimed that they were injured by reason of the plaintiff failing to execute the written contract pursuant to his bid and the award, and to carry out the work. The defendant moved the court to direct a verdict in its favor, which motion was overruled. Judgment was rendered against the defendant and it appealed. The statute of Illinois provided that “all proposals of bids offered shall be accompanied by cash or by check payable to the order of the president of the local improvements in his official capacity, certified



by a responsible bank for an amount which shall not be less than ten per cent of the aggregate of the proposal," and the statute also provided, "but if the said bidder fails, neglects or refuses to enter into a contract to perform such work or improvement as herein provided, then the certified check accompanying his bid and the amount therein mentioned shall be declared forfeited to said city, village, or town, and shall be collected by it and paid into its funds for the repairing and maintenance of like improvements; and bonds therefor may be prosecuted and the amount due thereon collected and paid into said fund." And in commenting upon this section, the court said: "By the words 'entering into a contract,' in the provision last quoted (referring to the statute referred to above), is meant a formal written and signed instrument evidencing the contract."

Further commenting upon the issues involved, the court said:

"In 1 Parsons on Contracts, Sec. 476, 6th Ed., the author says: 'Thus an offer to sell a certain thing on certain terms, may be met by the answer, "I will take that thing on those terms," or by any answer which means this, however it may be expressed; and if the proposition be in the form of a question, as, "I will sell you so and so; will you buy?" the whole of this meaning may be conveyed by the word "yes," or any other simple affirmative answer. And thus a legal contract is completed.'

"In 7 Eng. & Am. Ency., 2nd Ed., p. 125, this language is used: 'All express executory contracts re-

solve themselves, upon analysis, into an offer by one of the parties and an acceptance of that offer by the other. *The act of acceptance closes the contract, and ordinarily nothing further is required to make the obligation effective.* No especial formalities are required.'

"In *Garfield vs. United States*, 93 U. S. 242, the United States advertised for proposals for carrying mails. Garfield made a proposal which the Government accepted, in reference to which the court said: 'The court of claims holds that the proposal on the part of Garfield, and the acceptance of the proposal by the department, created a contract of the same force and effect as if a formal contract had been written out and signed by the parties.' Many authorities are cited to sustain the proposition. We believe it to be sound, and that it should be so held in the present case.'

"Plaintiff was notified by the specifications for the work which he signed, and by the statute, that in order for his bid to be considered, it was necessary for it to be accompanied with \$500.00 in money, or a certified check for that sum, and he must be presumed to have had knowledge of the law that, if he failed, neglected or refused to enter into a formal contract for the performance of the work, his money should be forfeited. He certainly failed and neglected to do so, and the excuses which he gives for so failing and neglecting are of the most flimsy character. When he called at the defendant's office February 23, 1906, he does not even show that he was even ready to receive the written contract from the defendant had it been ready. The specifications which he signed require a bond with surety satisfactory to the defendant, for \$5,000, guaranteeing the satisfactory completion of the contract within the time limit, and indemnifying the board against any loss or damage which might or could result by or through the carrying out of the contract. Manifestly, he was not entitled to receive a formal contract executed by the defendant, until he should furnish such bond. Yet so far as appears from the evidence,

he had not such bond with him when he visited defendant's office February 23rd, nor did he at that time, or any time, offer any surety, in case the defendant was to draft the bond. February 24th was Saturday and February 25th Sunday, and on February 26th, the day when defendant wrote plaintiff that the contract and bond were ready to be executed, he procured a letter from a physician stating that he was in a very nervous condition, and that he, the physician, had advised him to discontinue all business for three months, and February 27th he left for West Baden, Indiana, where he says he remained for ten or twelve days. He never went to the defendant's office again. Our impression from the evidence is, that plaintiff for some reason best known to himself, desired to relieve himself of the responsibility cast on him by the acceptance of his bid, and perhaps this was worth \$500.00 to him. The contract was let to the next lowest bidder, whose bid exceeded plaintiff's, \$1,010. So that defendant lost at least \$510 by plaintiff's default. The plaintiff clearly forfeited the \$500.00 which he deposited with the defendant, and the court erred in sustaining plaintiff's motion to instruct the jury to find for him, and in overruling defendant's motion to instruct the jury to find for it. The judgment will be reversed."

It will be observed that Illinois court cites and follows the case of *Garfield v. United States*, 93 U. S. 242, in which that court *laid down the rule that where the United States had advertised for proposals for carrying mails and a party filed a proposal and the government accepted it, that these different instruments constituted a complete and binding contract.*

And the Illinois court expressly holds that this is true even though the statute itself provides for the entering into a formal written contract. This provision of the statute of

Illinois is much stronger than a provision in a notice, as in the case at bar, that a "contract" shall be entered into, which used in that sense only means as stated by the authorities that the party merely agrees that he will, together with the City, re-state the agreement or contract already made by reducing it to writing in a formal instrument.

The Court of Appeals of New York in the case of *Sanders et al. v. Pottlitzer Bros. Fruit Co.*, 39 N. E. 75, said:

"Where parties have exchanged letters and telegrams with a view to an agreement and have arrived at a point where a clear and definite proposition is made on one side and accepted on the other, with an understanding that the agreement shall be reduced to a formal writing, the contract is complete, though no formal writing is ever executed."

Attention is also directed to the case of *Post v. Davis*, 52 Pac. 903, decided by the Court of Appeals of Kansas, Northern Department, in which Justice McElroy, speaking for the court, said:

"A contract for the lease of lands made in writing by telegrams and letters, where there is nothing left for parties except to execute a written lease, the mere fact that such written lease was in contemplation does not relieve either of the contracting parties from the responsibility of the contract which was already expressed; but where one of the parties without just reason, refuses to execute the lease, the other had the right to fall back on their written proposition as originally made in the letters and telegrams. If they constituted a contract in themselves, the absence of the formal agreement contemplated was not material."

The Supreme Court of North Carolina in the case of *Rankin et al. v. Mitcham*, 53 S. E. 854, said:

“A binding oral contract may be made between parties though there is an understanding that it is to be subsequently reduced to writing, which writing is not completed by the signature of all the parties.”

And further on in the opinion the court says:

“It seems to be generally held that a binding contract may be made between parties although there is an understanding that it is to be reduced to writing, which writing is not completed by the signatures of all the parties.”

Another case worthy of consideration is that of the *City of Ft. Madison v. Moore et al.*, 80 N. W. 527, decided by the Supreme Court of Iowa. In commenting upon whether or not there was a binding contract in the absence of a formal written instrument, the court said:

“Where the work to be done is fully described in specifications which were referred to in the advertisement for bids, by the city, an acceptance of the bid in writing entered of record constitutes a contract for the performance of which a bond may be given.”

And then again further on in the opinion the court says:

“The work to be done was fully described in the specifications which were referred to in the advertisement for bids. Defendant's bid, which was in writing, was duly accepted and the acceptance entered of record. No further contract was made, although the notice for bids provides for such an instrument. Appellant seems to claim something of this kind, but we do not see how they can derive any advantage therefrom. *There*

*was a contract by the acceptance of defendant's bid and a bond in suit was given to secure its performance."*

The Supreme Court of Ohio in the case of *Blaney and Morgan v. David T. Hoke*, 14 Ohio State Reports 292, said:

"Where an agreement not within the purview of the statute of frauds is in all other respects completed—in the absence of any understanding between the parties that the same should not be completed until reduced to writing—the same will bind the parties although it may have been understood between them that the agreement should afterwards be formally reduced to writing and executed."

In the case of *Roberts v. First National Bank of Fargo (Bemis Bros. Bag Co., interveners)*, (N. D.), 79 N. W. 993, the same doctrine was declared by the Supreme Court of North Dakota. In commenting upon the issues involved in that case the court quoted with approval the following language from the case of *Bell v. Offutt*, 10 Bush. 632: "If two persons enter into a verbal agreement about a matter as to which an enforceable parol contract can be made, it would be no defense when one of them is sued for a breach of the contract, that he understood it would not be obligatory unless reduced to writing; nor does a contemporaneous agreement to reduce a contract to writing make its validity to depend upon its being actually reduced to writing and signed. The agreement to put it in writing amounted to no more than an agreement by the parties to provide a particular kind of evidence of the terms of the

*contract*, and no more prevented its enforcement upon other legal evidence than an agreement that they would go to a named individual, and state to him the terms of their contract, would render the testimony of any other competent witness inadmissible to prove what the contract was.”

And then the court refers to the case of *Green v. Cole*, 103 Mo. 70, 15 S. W. 317, from which the following language is quoted:

“There must be a mutual assent to all of the propositions; for, so long as any matter forming an element of the contract remains open, the contract is complete. Though the terms of the contract may all be agreed upon, still, if the parties make it a condition to the existence of the contract that the terms agreed upon be reduced to writing and signed by them, there is no contract until this is done. On the other hand, it is well settled law that, where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing does not negative the existence of a present contract. In other words, if the parties make an agreement which they intend shall be binding from the time it is made, effect will be given to it from that time, though they intend it shall be superseded by a more formal written instrument.”

Citing in support thereof the cases of *Steamship Co. v. Swift*, 86 Me. 248, 29 Atl. 1063; *Sanders v. Fruit Co.*, 144 N. Y. 209, 39 N. E. 75; *Hodges v. Sublett*, 91 Atl. 588, 8 So. 800; *Blaney v. Hoke*, 14 Ohio St. 292.

From these decisions and many others bearing upon the point it appears that the rule is firmly established that where two parties agree to a contract orally, if it is a



contract that may be made in parol, as to all of the terms and conditions, but at the same time agree that they will reduce that contract to a formal instrument in writing, the agreement to reduce the contract in a formal way to writing does not leave the contract open, and from the terms of which either may withdraw, but it is enforceable as to each as fully and completely as though it had been reduced to writing. On the other hand if it is a transaction or a contract which must be evidenced by writing, it is immaterial if that contract is evidenced by different instruments instead of one instrument, and the courts have held that, in letting public improvements, the notice by the city, and reference therein to plans and specifications on which the bids must be made, the filing of the bid, and the awarding of the contract or bid by the City Council, which award is made a matter of public record in the journal of the city council constitute a valid and binding contract, notwithstanding the notice provides that the party shall enter into a "written contract."

The authorities hereinbefore cited upon this subject we think clearly establish this as the correct rule and we believe it to be the law in the case at bar. It has been so held by the Supreme Court of the United States.

The fact that the notice, the plans and specifications, the bid and the award constitute a contract has been recognized in the case of *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 285, and we believe there is no

merit whatever in the contention of the defendants in this case that when the Mayor and City Council accepted the bids of David McCormick for the improvements of these various streets and awarded the contracts to him that it did not constitute a valid and binding contract until the formal written contract was signed. McCormick did everything that was within his power to do. He filed his bids within the time stated in the notice. He deposited with the City Clerk his certified checks for these various improvements, which checks still remain in the hands of the City. He tendered in open council formal written contracts in conformity with the contract evidenced by the notice, plans, specifications, bids and awards, and demanded that they be executed on behalf of the City, they already having been signed by David McCormick, and tendered and offered to file bonds for the faithful execution of the work as it was provided he should do. These contracts and bonds were rejected. The City purported to set aside his awards and to award the contracts to The Conway Company. McCormick offered to do the work, *bought a portion of the material to the end that he might do the work and was prevented only from making the improvements by reason of the wrongful and unlawful interference of the City and its officers and of The Conway Company and its agents.* All of these matters and things were done by Mr. McCormick before any work was done by The Conway Company upon any of the streets in controversy. But notwithstanding that

fact it was insisted on the final hearing in the court below, and will doubtless be insisted here by the appellees, that inasmuch as the work was completed at the time of the final hearing the appellant should be denied any relief. With this contention we cannot agree, but insist that the appellant was entitled to the equitable relief prayed for in his bill when it was filed and the appellees brought into court. But the appellees made it impossible for the court before the final determination of the action to render the particular relief in equity prayed for, and the appellant has suffered damages by reason of the breach of the contracts, and the court should retain jurisdiction of the case and assess his damages and render judgment therefor.

The lower court clearly misapprehended, in our opinion, the meaning of the language used in the notice, specifications and the Statute, with reference to a "written contract." The opinion of the trial court will be found on pages 68 to 69 inclusive of the printed record. The court in the first paragraph of the opinion, after stating what it conceives to be the fact, says (page 68 of printed record):

"Where a city in this state has determined to let a contract for street improvement, under the legislative act approved April 17, 1908, and has received bids therefor, it does not necessarily enter into a contract with the lowest and best bidder by accepting his bid and awarding the contract, but may lawfully provide a method whereby the contract does not become complete until an instrument in writing shall be executed by both parties embodying all of the terms of the agreement."

Then in paragraph 2 the court says:

“If the latter method of contracting is in fact adopted by a city and that is known to a bidding contractor and when his bid is submitted it is the intention and understanding of both parties that the proposed contract is not to be completed until such writing is executed, the action of the city in adopting a resolution accepting the bid and awarding the contract, does not of itself complete the contract, and may therefore be reconsidered and revoked at any time before the formal execution of the contract in writing.”

There is *nothing in any of the notices, resolutions or statute indicating that it was not the intention of the City to enter into a contract when the award was made. On the contrary, each and all of these instruments and especially the statute recognizes that the contract is complete when the award is made and the notice and specifications merely provide for the future stating of the contract in a more formal way in one instrument. As to whether or not the City may provide that the contract shall not be binding until a formal contract is signed is not involved in this case at all, because that limitation was not placed in the notice or in the specifications, and the statute itself refutes such an idea.*

The entire decision of the court is based upon the theory that inasmuch as the specifications and the notices provide for the entering into a formal contract, no contract would be complete until such instrument was formally signed up.

The courts of New York also carefully adhere to the doctrine for which we contend, and we first direct the

Court's attention to the case of *Disken v. Herter*, 77 N. Y. Supp., page 300. This decision is by an intermediate court, but it follows the case of *Sanders v. Fruit Company*, 144 N. Y. 209, 39 N. E. 75, and the court, in the second paragraph of the syllabus, uses the following language:

“Where all the substantial terms of a contract have been agreed on, and there is nothing left for future settlement, the fact, alone, that it was the understanding that the contract should be formally drawn up and put in writing, did not leave the transaction incomplete and without binding force, *in the absence of a positive agreement that it should not be binding until so reduced to writing and formally executed.*”

And again, in the body of the opinion, the following language is used:

“That it was the understanding that the contract should be formally drawn up, and put in writing, did not leave the transaction incomplete and without binding force, in the absence of a positive agreement that it should not be binding until so reduced to writing and formally executed. All the substantial terms were agreed upon; there was nothing left for future negotiation or settlement; and under those circumstances the rule annaunced in *Sanders v. Fruit Co.*, 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757, applies.”

The New York Court of Appeals in the case of *Sanders et al. v. Pottlitzer Bros.' Fruit Co.*, 39 N. E., page 75, carefully considered the very contention we have in this case, as to whether or not, where all the conditions are agreed and assented to by the parties, such assent constitutes a binding contract, where it is further agreed that their un-

derstanding shall be reduced to writing. In the syllabus of the opinion, the court said:

“Where parties have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on one side and accepted on the other, with an understanding that the agreement shall be reduced to a formal writing, the contract is complete, though no formal writing is ever executed.”

And then, in the body of the opinion, the court comments further upon the agreement which was present in that case to execute a formal written contract. The court said:

“It is true, as found by the learned referee, that the parties intended that the agreement should be formally expressed in a single paper, which, when signed, should be the evidence of what had already been agreed upon. *But neither party was entitled to insert in the paper any material condition not referred to in the correspondence, and if it was inserted without the consent of the other party it was unauthorized. Hence the defendant, by insisting upon further material conditions, not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties.* The plaintiffs then had the right to fall back upon their written proposition, as originally made, and the subsequent letters and telegrams; and, if they constituted a contract of themselves, the absence of the formal agreement contemplated was not, under the circumstances, material. When the parties intend that a mere verbal agreement shall be finally reduced to writing, as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed. *But here the contract was already in writing, and it was none the less obligatory upon*

*both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties, by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence.* Vassar vs. Camp, 11 N. Y. 441; Brown vs. Norton, 50 Hun. 248, 2 N. Y. Supp. 869; Pratt vs. Railroad Co., 21 N. Y. 308. The principle that governs in such cases was clearly stated by Judge Selden in the case last cited, in these words: 'A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party, and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was that a written contract embodying these terms should be drawn and executed by the respective parties—this is a obligatory contract, which neither party is at liberty to refuse to perform.'

"In this case it is apparent that the minds of the parties met, through the correspondence, upon all the terms, as well as the subject-matter, of the contract, and that the subsequent failure to reduce this contract to the precise form intended, for the reason stated, did not affect the obligations of either party, which had already attached, and they may now resort to the primary evidence of their mutual stipulations. Any other rule would always permit a party who has entered into a contract like this, through letters and telegraphic messages, to violate it, whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where, by



changes in the market, or other events occurring subsequent to the written negotiations, it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. *A stipulation to reduce a valid written contract to some other form cannot be used for the purpose of imposing upon either party additional burdens or obligations, or of evading the performance of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law.*"

It will be seen that this court in unmistakable language declares the law to be that a stipulation to reduce a valid written contract to some other form cannot be used for the purpose of imposing upon either party additional burdens or obligations, *or evading the performance of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law.* The City of Oklahoma City, having awarded the contracts upon the bids made by McCormick, which bids were based upon the plans, specifications, resolution, etc., of the City Council, and notices published, which were complete in every detail, could not evade that award or change any of the conditions disclosed by those records. The agreement for a future contract—if such be conceded—was an agreement to reduce the understanding or conditions disclosed by the resolutions, plans and specifications, notices, bids and awards to a more convenient form. The City could not evade its responsibility by merely refusing to execute the formal written contract.

The Supreme Court of New York, also, in the case of *Pratt, Survivor, etc. v. The Hudson River Railroad Co.*, 21 N. Y. 305, said:

“Where a proposition for a contract, to be in writing and executed by the parties, has been made by one party and accepted by the other, the terms of the contract being in all respects definitely understood and agreed upon, the party refusing to execute the contract is responsible, it seems, on the breach of his agreement for the same damages as would be recoverable for an entire refusal to perform the contract after its execution in writing. *Per Seldon, J.; Comstock, Ch. J., Welles and Bacon, Js., concurring.*” \* \* \*

The Supreme Court of Kentucky, in the case of *Hollerbach & May Contract Co. v. Wilkins*, 112 S. W. Rep. 1126, said:

“Where all the terms of a contract, by which plaintiff agreed to furnish defendant a specified quantity of broken stone at a certain price per cubic yard, were agreed to, and the contract was dictated to defendant’s stenographer with instructions to write out duplicates, and send them by mail to plaintiff, who was to sign both and return one to defendant, the contract was complete and enforceable, though not reduced to writing and delivered before defendant’s breach.” \* \* \*

“The mere fact that the oral contract was to be afterwards reduced to writing does not render it unenforceable. *Bell v. Offutt*, 10 Bush. 632; *Mattingly v. Springfield, F. & M. Ins. Co.*, 120 Ky. 768, 83 S. W. 577. If the minds of the parties had met, and nothing else was to be agreed upon, the mere fact that the parties were to reduce their understanding to writing does not militate against the right of either to sue for a breach of the oral agreement.”

The test fixed by this court is: Had the minds of the parties met on the proposition under consideration—and was anything else to be agreed upon? There certainly was not, in the case at bar. As heretofore stated, every detail of the improvement was specified and definitely fixed, and an unconditional bid made to do the work and an unconditional acceptance of that bid was made by motion duly passed by the City Council.

The Supreme Court of Kentucky again in the case of *Tucker et al. v. Pete Sheeran Bros. & Co.*, 160 Ky. 176 discusses the principle involved in this case, and on page 178 of this report the court uses the following language:

“It follows that an agreement may be made by word of mouth, and yet, if it is the intention of the parties that it shall not be binding until put in writing, there can be no enforceable agreement until that is done. The reason for the rule is that, where the agreement provides it shall not be a binding contract until it is put in writing, the condition is a part of the agreement. The first and most essential element of an agreeemnt is the consent of the parties. There must be the meeting of two minds in one and the same intention. Pollock, p. 3.

“If something remains to be done before the contract is binding, there is no contract. If, however, a verbal contract is actually made, the mere fact that it is to be afterwards reduced to writing does not render it unenforceable, unless it be within the statute of frauds.”

The court here pointed out that if a contract not in writing would be within the statute of frauds, of course

it could not be enforced, but every detail of the contract in controversy was in writing, nothing was left to oral negotiation and we wish at this time to call the court's attention to the fact that inasmuch as all of these instruments and all of the understanding between the parties to this action were in writing, it becomes a matter of law for the court to determine as to whether or not those written instruments constitute a valid and binding contract. The Supreme Court of Kentucky in the cases referred to says if they do, then they are binding upon the parties, *notwithstanding there may also have been an agreement that that understanding and agreement should be further evidenced by a more formal written contract.*

The courts of Missouri have also adopted this same rule, as shown by the case of *Lowrey v. Danforth (Mo.)*, 69 S. W. Rep., p. 39. In that case the court said:

"A contract complete in itself is binding when nothing is left open to negotiation, although it may contemplate a future instrument of more formal character." Citing *Green v. Cold*, 15 S. W. 317, 103 Mo. 70, followed.

And then again on page 41 of the report, in the same opinion, the court declares:

"The interpretation to be given this paper suggests an analogy furnished by the rulings in cases where parties have made a complete agreement, which, however, contemplates a more formal statement of their contract, yet the complete agreement is nevertheless held binding upon them if there has been a perfect

meeting of their minds, and their intention is fully expressed. If, on the other hand, it appears that something still remains to be agreed upon, and the purpose to reduce the agreement to writing implies that the agreement so far made is not the end of negotiations, then the preliminary understanding does not have the force of a completed contract."

It will be seen from this and all of the other cases the test is: Has that which has gone before been merely negotiations without the assent of the minds of the parties to the particular thing and which it is understood specifically shall not constitute a contract until reduced to writing and signed by the parties? Where this is the case, of course, no contract is made, but if the conditions are assented to and it is the intention of the parties that the things agreed upon shall constitute their understanding, but that a more formal written contract shall be prepared and signed, the failure to execute the formal written contract in no way changes the liability of the respective parties or releases them from their obligation.

In *Green v. Cole*, 15 S. W. Reporter 317, the court recognizes that if it is agreed between two parties that a contract shall not be completed until a formal written contract is prepared and injured, that the executing of the written contract is a condition precedent to the consummation of the agreement, and then follows with this statement:

"On the other hand, it is well-settled law that, where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing

does not negative the existence of a present contract. In other words, if the parties make an agreement which they intend shall be binding from the time it is made, effect will be given to it from that time, though they intend it shall be superseded by a more formal written agreement. 2 Wheat. Con. Sec. 645; *Bonnewell v. Jenkins*, 8 Ch. Div. 70; *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Blaney v. Hoke*, 14 Ohio St. 292; *Montague v. Weil*, 30 La. Ann. 50; *Mackey v. Mackey's Admr.*, 29 Grat. 158; *Bell v. Offutt*, 10 Bush. 632. In the recent case, *Allen v. Chouteau*, 14 S. W. Rep. 869, a written proposal concluded with these words: 'If this is agreed to the agreement can be fully drawn up and signed,' and we held that an acceptance of the proposal would make a binding contract, though no further written agreement was ever drawn up or signed by the parties.

"We do not regard the case of *Eads v. City of Carondelet*, 42 Mo. 113, as in conflict with what has been said, for that case proceeds upon the ground that all of the terms of the contract had not been settled, for the mayor was authorized to make a contract with 'such further conditions as may be deemed necessary.' Enough has been said to show that where parties have assented to all the terms of a parol agreement it does not follow, from the mere fact that a written contract is to be thereafter prepared and signed, that no binding contract was made."

*Drummond v. Crane et al.* (Mass.), 35 N. E. Rep. 90, was a case which involved a contract for a certain amount of water used in manufacturing, etc. The preliminary memorandum which was signed was in the following language:

"New York, June 11th, 1888.

"M. J. Drummond.

"Dear Sir: I hereby agree to enter into a formal contract with the Housatonic Water Company, when organized, binding myself to take at least seven hun-

dred and fifty (\$750) dollars' worth of water per annum for the period of ten years, on the following basis: Water for manufacturing purposes, 12½ cents per 1,000 gallons; hydrants, \$40.00 per annum each; private dwellings, one tap for one family, \$8.00 per annum. In the construction of these waterworks, they are to commence at Long Pond, with a 14-inch pipe, and continue with a 12-inch pipe, then reducing to 10-inch, then to 8-inch to the village, and using 6-inch and 4-inch distribution pipes. C. R. Crane."

It will be observed that this instrument provided *that the parties agreed to enter into a formal contract with the Housatonic Water Company, when organized*. The question was raised there, of course, as here, that the memorandum did not constitute a binding contract, but was merely preliminary and the contract was not concluded until the formal writing was executed and signed. The court said:

*"The liability on the contract is not affected by the fact that a more formal contract was to be entered into with the water company when it should be formed, as it was expected that plaintiff would own substantially all the stock of the company, so that his interest would be nearly the same as if the second contract were made with him." \* \* \**

"The considerations which we have put forward are not affected by the fact that the contract sued upon contemplated another more formal contract. That is merely an additional wheel in the machinery. Nor does it matter that the second contract would be made with another party."

The case of *Joseph Wharton v. Luke J. Stoutenburgh*, 35 N. J. Equity 266, is also in point. This case involves the making of a lease for certain mining property. Certain



correspondence was exchanged between the parties interested. In one of the communications it was said:

“Of course, a formal lease will be prepared and signed by us at a more convenient time, before the expiration of your existing contract to deliver ore, which I understand will be complete some time in March. Please acknowledge receipt of this and thus confirm the bargain.”

In answer to this letter, the other party said:

“In order to have all things ready in time for you to take possession at the termination of my contract with said company, I will write and send you such a lease as I may think equitable for your consideration and approval, if it shall suit you.”

The one party refused to execute the lease and suit was brought for specific performance. Decree was entered in favor of the plaintiff, which judgment was affirmed on appeal. The court in stating the law applicable to those facts, said:

“Where, in cases within the statute of frauds, the negotiations have been conducted in writing, if there has been a final agreement between the parties, the terms of which are evidenced in a manner to satisfy the statute, *the agreement will be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, to be prepared and signed.* As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his lawfully authorized agent, *there exist all the materials which the court requires to make a legally binding contract.*”

The Supreme Court of North Carolina, in the case of *Gooding v. Moore et al.*, 63 S. E. Rep., p. 895, considered

the point involved in the case at bar, in an action brought for a breach of contract for the cutting of logs. It was contended by the plaintiff that a binding contract was entered into between him and the defendant, although it was understood and agreed that a subsequent written contract should be signed up. The contention on the one hand was that there was no contract until the writing was signed. The court said:

“Where a contract was entered into between plaintiff and defendant’s agent, and the intention to reduce the agreement to writing was but a formality to be carried out for convenience, and not a condition precedent to the contractual relation, the fact that no written contract was agreed to did not preclude a recovery on the original agreement.”

The judgment in the above case was for the plaintiff, for a less sum than that for which he prayed. He appealed and the case was reversed and remanded.

In the case of *International Harvester Company of America v. Campbell* (Texas), 96 S. W. Rep. 93, the court considered a contract of employment. It was understood that the contract should be reduced to writing and signed by the parties. The court in that case laid down the rule that *inasmuch as there was no agreement that the contract should not become effective until reduced to writing, that the writing when executed would simply be a convenient record of the contract previously agreed to.* The court said:

“Where an agreement on all the terms of a contract have been reached by the parties, and nothing

remains except to reduce the terms to writing, the contract is complete in the absence of evidence that the contract was not to become effective until reduced to writing, and a breach of it by either party supports an action."

In the case of *American Warehouse Co. v. Ray*, 150 S. W. Rep. 763, the Supreme Court of Texas considered a contract for the sale of broom corn seed. The court said:

"Where an agreement is reached by the parties on all the terms of a contract, and nothing remains except to reduce the terms to writing, *and there is no evidence that it was not to become effective until reduced to writing, a breach of it by either party, causing damage to the other will support an action for damages though it was unwritten.*"

It will be seen that here the Supreme Court of Texas declared the doctrine that where there are oral negotiations and an agreement made and a stipulation or understanding that the agreement shall be reduced to writing, the contract will be presumed to rest upon the original agreement before the writing is made, *and in order to take the case out of that presumption there must be evidence to the effect that the contract was not to become effective until reduced to writing and signed by the parties.*

The Circuit Court of Appeals, in its opinion in the case at bar, proceeds upon the presumption that where a future written contract is provided for, the contract itself is not concluded until the writing is executed. *The authorities, however, are to the effect that where the parties have assented to all the terms of the arrangement and then agree*

for a formal contract, the evidence must affirmatively show that it was the agreement of the parties that the contract should not become effective until the formal writing was drawn up and signed, and unless the evidence does so show, the presumption is that the original agreement was concluded and that the provision for the future contract was merely intended to preserve in a more substantial form the evidence of the terms of the agreement. That, however, would not be the effect in the case at bar, because the plans, specifications, notices, bids and awards constituted a complete written record of the entire agreement.

The case of *Featherstone Foundry & Machine Co. v. Criswell* (Indiana), 75 N. E., page 30, was a suit by the plaintiff for \$2,500 for commission on sale made in reference to refrigerator department. Judgment was for the plaintiff. It was the understanding that the contract should be reduced to writing. In commenting upon the law the court said:

“Where an employe submitted to his employer a form of a contract containing stipulation as to compensation, and the employer read it and stated that it was all right, and that it would be fixed up later, and directed the employe to begin work, there was a completed contract of employment before the same was signed, entitling the employe to recover the compensation stated in the proposed contract, though it was never signed.”

In Kansas the same rule has been applied for which we contend in the case at bar. See the case of *Post v. David*, 52 Pacific 903, which was a contract to execute a lease. The negotiations were carried on by telegrams and letters, a future contract was to be executed. The court said:

“A contract for the lease of lands, made in writing, by telegrams and letters, where there is nothing left for the parties except to execute a written lease, the mere fact that such a written lease was in contemplation does not relieve either of the contracting parties from the responsibility of the contract, which was already expressed; and where one of the parties, without just reason, refuses to execute the lease, the other had a right to fall back on their written propositions as originally made in the letters and telegrams, if they constitute a contract in themselves. The absence of the formal agreement contemplated was not material.”

And then in the body of the opinion the court used the following language:

“The question presented to this court is upon this correspondence. Does it constitute a contract? *There was no objection made that the written lease presented for execution was not drawn according to the conditions contained in the letters and telegrams of the parties.* The last telegram and letter of Davis were both before Post at the time he wrote his telegram: ‘Letter just received. D. N. Burton will be in St. Joe by the 15th, and will bring lease. If need pasture before, turn cattle in as per telegram.’ This telegram authorized the defendant, Davis, to take possession of the pasture, thereby conceding all of the conditions and requirements exacted by Davis. *There was nothing more left for the parties except to prepare and execute a written lease.* The mere fact that a written lease was in

contemplation does not relieve either of the contracting parties from the responsibility of the contract which was already expressed in writing. *It is true, as found by the trial court, that the parties intended that the agreement should be formally expressed in a single paper—a lease—which, when signed, should be evidence of what had been agreed upon.* But one of the parties (the defendant), without any just reason or excuse therefor, refused to execute the lease. *The plaintiff then had a right to fall back on their written propositions as originally made in the letters and telegrams, and, if they constitute a contract in themselves, the absence of the formal agreement contemplated was not material.* Here the contract was already in writing, and it was none the less a contract for the reason that they intended that it should be put in another form, especially when their intention was made impossible by the inexcusable act of one of the parties. *Sanders v. Fruit Co., 144 N. Y. 209, 39 N. E. 75.* The writings contained all of the contract contemplated to be afterwards expressed in a written lease. The parties had agreed upon every condition of their contract of lease. When the lease was presented to Davis for execution, the only excuse that he made for not executing the same was that he had failed to get the cattle. The plaintiff tendered performance of all the requirements of the defendant. *The measure of damages sustained by plaintiff was the difference between the contract price of the leased premises as agreed upon and the amount that the plaintiff was able to realize out of the property after he was notified that the defendant did not intend to take the pasture.* The evidence clearly established that damage to be \$1,850, and the plaintiff should have judgment for that amount, with interest from November 1, 1894."

In the case at bar, as in the case just referred to, in the language of that court—"there was nothing more left for the parties except to prepare and execute a written

lease.” In the case at bar there was nothing left for the parties except to execute the formal written contract; they had already agreed to every detail by the written instruments and proceedings of the City Council which preceded.

Attention is also directed to the case of *Ocala Cooperage Co. v. Florida Cooperage Co.* (Florida), 52 Southern Reporter, page 13. In this case judgment was for the defendant; the plaintiff appealed and the judgment of the lower court was affirmed. The court commented upon certain writings or negotiations between the parties, and then laid down the law as follows:

“While it is true that where parties orally agree upon the terms of a contract, and there is a final assent thereto, so that no variation can be introduced into the writing except by mutual consent, the mere suggestion or intention to put the agreement in writing at a subsequent time is not, of itself, sufficient to show that the parties did not intend the parol contract to be regarded as complete and binding without being put in writing; but where it appears that the parties, or either of them, intended that the contract should be reduced to writing, so that its terms would be fully understood and definitely stated in the writing, the contract will not be regarded as complete or binding until it is reduced to writing and acquiesced in by both parties.”

It will be observed that this court says, “while it is true that where parties orally agree upon the terms of a contract and there is a final assent thereto, so that no variations can be introduced into the writing except by mutual consent, the mere suggestion or intention to put



the agreement in writing at a subsequent time is not of itself sufficient to show that the parties did not intend the parol contract to be regarded as complete and binding without being put in writing."

Note the rule laid down by this court: In order to prevent the previous negotiations where the parties agreed, from constituting a binding contract, *it must affirmatively appear that the parties did not intend the contract to be binding until reduced to writing.* There is not a scintilla of evidence prior to the awarding of the contract which indicates that the parties did not intend the award of the contract to consummate and conclude a binding contract or agreement. Then the court states the converse of that rule, and says that "where it appears that the parties (now again it must appear affirmatively), or either of them, intended the contract should be reduced to writing so that its terms would be fully understood and definitely stated in the writing, the contract will not be regarded as complete or binding until it is reduced to writing and acquiesced in by both parties."

The rule is that where the parties have reached a conclusion as to a contract, the contract will be considered as closed even though a formal written contract is provided for, unless it affirmatively appears to the contrary, and in the case at bar, as to whether or not there were binding contracts when the awards of the contracts were made, the court must look to the resolutions of the Council, the published notices, the plans and specifications,

the bids and the awards, and to these instruments alone, and if from these the court can say that they constitute a contract and that the minds of the parties had agreed upon the matter, then and in that event the contention of the appellant, in our humble opinion, must be sustained, and as the entire negotiations were in writing, the case presents purely a question of law and not of fact.

The case of *Hinote v. Brigman et al.* (Florida), 33 Southern Reporter 303, was a case in which the defendant in error sued plaintiff in error and obtained judgment for \$884.00 and costs, from which judgment an appeal was taken. The case was reversed because of an erroneous instruction given by the court. The instruction asked by the defendant was "that if they (the jury) believed from the evidence that at the time of making the original verbal contract it was the intention of the parties that it should not be binding unless reduced to writing and signed by the parties, and that the written contract was never signed by plaintiffs, they should find for the defendant." The court refused to give the instruction as requested, but modified it by adding the qualification that "unless the signing by plaintiffs was waived by defendants entering upon the performance of the contract after he had signed it, and knowing it was not signed by plaintiffs."

The court held that the modification made by the court was error. The instruction requested by the defendant was

undoubtedly the law because it embraced the affirmative statement "that if it was the intention of the parties that it should not be binding unless reduced to writing." The court in commenting upon this case and the law involved therein said:

"The second count declares upon a completed contract, made the 20th day of December, 1891, the terms of which are stated, and it is alleged that defendant then promised to sign a written obligation containing the terms of the agreement whenever plaintiffs would have the same prepared, and that they did thereafter prepare it, and defendant signed it; a copy being attached as a part of the declaration. This second count we construe to be upon a completed verbal contract, made on the 20th day of December, 1891, the terms of which were then assented to by both parties. If the terms of the contract were mutually agreed upon, and the parties came to a definite conclusion in reference to the same, the fact that it was further agreed that the terms of the agreement should be put in writing and signed will not affect the contract made, though it was never reduced to writing and signed. *Bell v. Offutt*, 10 Bush. 632; 7 Am. & Eng. Enc. Law (2nd Ed.) 140, and cases cited."

*Observe the test made by the court here. If the terms of the contract were mutually agreed upon and the parties came to a definite conclusion in reference to the same, the fact that it was further agreed that the terms of the agreement should be put in writing and signed will not affect the contract made, though it was never reduced to writing and signed.*

In the case of *Webber v. Smith* (California), 140 Pacific 37, the action was brought to recover first an amount

of money alleged to be owing from plaintiff to the defendant as the purchase of the good will represented by a milk route. There was a second cause of action which it is not material to take notice of as there was no controversy over the correspondence of the adjustment of the matters concerned therein.

A bill of sale was executed which covered all of the tangible property. It was contended that the other matters in controversy between the parties were covered by a verbal contract which it was understood should be reduced to writing. The court said:

“The intangible property was, according to plaintiff’s testimony, the subject of a separate agreement which it was the intention of the parties to express in writing, but which was not reduced to that form. The mere fact that it had been the intention to make a writing covering the conditions of the sale of the milk route, and that such writing had never been made, would not affect the validity of the contract, as it was represented to have been made by the plaintiff, nor entitle it to be viewed in any other light than that of a completed transaction, except as to the execution of it.”

The Supreme Court of Arkansas, in the case of *C. C. Emerson & Co. v. Stevens Grocer Co.* (Arkansas), 130 S. W. Reporter 541, considered an action for an alleged contract for the sale of a car of potatoes. The appellants were merchants located at St. Paul, Minnesota, and were engaged in the business of selling goods by the wholesale. The appellee was a corporation doing business at Newport,

Arkansas. The appellee alleged that the appellants had contracted to deliver to it at Marianna, Arkansas, a car of potatoes at an agreed price during the first half of February, 1908, and that they had wholly failed to do so and that it sought to recover from appellants the damages which it had sustained by reason of said breach of said contract. The appellants denied that they had entered into any contract for the sale of said potatoes. The negotiations leading up to the alleged consummation of said contract were conducted by letters and telegrams. Judgment was for the plaintiff and the defendant appealed. The case was reversed and remanded for a new trial. The evidence on the trial consisted of written negotiations and parol testimony. The court in its opinion said that the case presented an issue of fact as to whether or not a contract had been agreed to between the parties, and then in commenting upon the execution of a future written instrument as one of the conditions of the arrangement, the court said:

*"If the contract is actually entered into and made, whether by messages, correspondence, or by word of mouth, the agreement becomes at once effective, although it was expected that the terms would afterwards be embodied in a written instrument and signed. The mere reference to a future contract in writing would not negative a present contract, if the terms thereof were actually assented to by both parties. The written draft of the contract would only be a convenient record of the agreement and the evidence thereof, but it would only constitute evidence of the agreement, and its absence would not affect the binding force of the contract that was closed. Therefore, if*

*an unconditional offer is made and that offer accepted, this will constitute an obligatory contract, although the parties also understand that a written contract embodying the terms should be drawn and executed.* Bell v. Offutt, 10 Bush (Ky.) 632; Green v. Cole, 103 Mo. 70, 15 S. W. 317; Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757; Cheney v. Eastern Trans. Line, 59 Md. 557."

The Supreme Court of Arkansas again in the case of *Friedman et al. v. Schleuter et al* (Arkansas), 151 S. W. Reporter, p. 696, passed upon this same question. This was an action brought in the Circuit Court against appellants to recover damages for an alleged breach in a building contract with them. Appellees were contractors and house-builders and appellants were the owners of certain lots in the city of Ft. Smith upon which they desired to erect a three-story business house. Appellants advertised for bids for the erection of the house on the lots according to the plans and specifications furnished by them. The notice and advertisement for bids and the plans and specifications which accompanied them comprised twenty-two type-written pages of legal size. The description of the lots were contained in the notice and advertisement for bids. The plans and specifications were prepared by the architect of appellants and were full and complete. They contained a definite and detailed statement of the kind and quality of material to be used, the dimensions of the building and the various rooms to be contained thereon, and the exact manner in which every part of the work should be done. They were as specific as could be and were intended

as a definite and specific guide in the erection of the building. *They provided for a bond to be executed by the bidder and contained clauses relative to changes in the contract under disputes arising between the bidder and owner. They provided that the work should be done by union labor and that the contractor should be responsible for all damage suits arising out of and in connection with the work. Another clause provides that the "details, drawings, and specifications are intended to describe the work and shall not be deviated from without written instructions from the architect."* The notice and advertisement reserved to the owner three days to determine the successful bidder and provided that any and all bids might be rejected after the bids were opened. The bid of the appellees was as follows:

"Ft. Smith, Ark., Aug. 9-11.

"We propose to erect the building for Friedman-Mincer according to plans and specifications for the sum of \$26,229.00 (twenty-six thousand two hundred and twenty-nine dollars). This bid is subject to the agreement of June 15, 1911, between architects and contractors, and subject to three days' acceptance."

A question of fact was involved as to whether or not this bid was accepted, but there was evidence tending to show that a written contract was to be prepared. In the syllabus of the opinion, the court said:

"Where the terms of a contract are actually agreed on, the contract is effective, though it is expected that the contract shall be reduced to writing as evidence of the agreement."

"Where a contract for the construction of a building was orally agreed on, including the time for com-



pletion of the building and damages per day for any delay, the mere fact that the contract was to be reduced to writing as evidence of its terms did not prevent it from being effective from the date of the agreement of the parties."

"A contract for the construction of a building according to plans prepared by an architect, which fixes the time for the completion of the building and damages per day for any delay, and which requires the contractor to immediately enter on the work, is sufficiently definite for enforcement, though it is intended that the contract shall be reduced to writing as evidence of its terms."

And then the court in the body of the opinion uses the following language:

" 'But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties, does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties, so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed.' To the same effect, see *Western Roofing Tile Co. v. Jones*, 26 Okla. 209, 109 Pac. 225, Ann. Cas. 1912 B 127; 7 A. & E. Ency. of Law 140; Page on Contracts, Vol. 1, Par. 54; *Boysen v. Van Dorn Iron Works*, 94 App. Div. 95, 87 N. Y. Supp. 995; *Lowrey v. Danforth*, 95 Mo. App. 441; 69 S. W. 39; *Green v. Cole*, 103 Mo. 70, 15 S. W. 317; *International Harvester Co. v. Campbell*, 43 Texas Civ. App. 421, 96 S. W. 93; *Lane v. Warren*, 53 Tex. Civ. Appl. 122, 155 S. W. 903; *Diskens v. Herter*, 73 App. Div. 453, 77 N. Y. Supp. 300.

"In the application of the principles above announced

to the facts in the case at bar, it cannot be said that the undisputed evidence shows that the agreement made was not the end of the negotiations between appellants and appellees. Counsel for appellants insist that because the contract was to be reduced to writing and a bond tendered accompanying it, and because the notice and advertisement and the plans and specifications did not provide a time of payment to the builder and a time for the completion of the contract, that no contract could exist without such writing.

"The testimony of appellees shows that the bond provided for in the notice and advertisement was executed by appellees and accepted by appellants, that their bid was accepted by appellants, that they subsequently agreed that the time for the completion of the building should be 100 working days, and that the damages for delay in the completion of the building should be \$25.00 per day. It appears, then, from their testimony, that all the terms of the contract *were agreed upon, and its reduction to writing was intended merely for facility of proof as to its terms.* In such cases the provision for a contract in writing is not inconsistent with the present contract, *and this is especially true in a case where the things to be done are provided for in written plans and specifications, which are so definite and detailed as to present a perfect guide as to the rights and duties of the respective parties in the erection of the proposed building.*"

The court in this case places emphasis upon the fact that *there were plans and specifications prepared for the guide of the contractor in the erection of the building, and in commenting upon the matter the court sets forth the fact that it appears from the testimony that all the terms of the contract were agreed upon and its reduction to writing*

was intended merely for facility of proof as to its terms; then concluding with the language:

*"In such cases the provision for a contract in writing is not inconsistent with the present contract, and this is especially true in a case where things to be done are provided for in written plans and specifications, which are so definite and detailed as to present a perfect guide as to the rights and duties of the respective parties in the erection of the proposed building."*

This case and the case at bar are quite similar with the exception that the acceptance of the bid in the case above cited depended upon oral testimony, whereas in the case at bar it was evidenced by writing, and therefore the only question is as to whether or not the writing constituted in law an acceptance. We insist it did, because that acceptance of the City Council with the matters and things that preceded the same concluded a perfect agreement for everything connected with the improvements.

In the case of *Lawrence v. Milwaukee, L. S. & W. R. Co.*, (Wisconsin), 54 N. W. Reporter, page 797, the Supreme Court of Wisconsin considered an action by the plaintiff against the defendant to recover damages for defendant's delay in shipping a quantity of logs. From a judgment in favor of the plaintiff the defendant appealed. In the letters of negotiation between the parties a written contract was contemplated and it was insisted in this case, as it is in all of the others, that there was no contract until the formal written agreement was prepared and signed.

The court, however, held against this contention. It said:

“But it is also argued that because plaintiff in his letter of December 13th said, ‘I will be down the first of the week, and make out a contract,’ it is evident he did not intend or suppose that such letter perfected a contract for the shipment of the logs, binding upon both parties. Why not? True, he contemplated the execution of a more formal written contract, but it does not appear that either party contemplated the insertion therein of any stipulation upon which their minds had not already met, and which was not substantially inserted in the two letters.”

How peculiarly applicable is the language of this court to the case at bar. The court in that case said “*it did not appear that either party contemplated the insertion therein (referring to the formal written contract) of any stipulation upon which their minds had not already met and which was not substantially inserted in the two letters.*”

There is no element of the contract in controversy in the case at bar which was not fully and completely covered by the resolutions, notices, plans, specifications, bids and awards. *Neither party contemplated inserting in the formal written contract any new condition*, and the things that were done are the only matters to be done to constitute a contract for the letting of a public improvement, as shown by the Statute of Oklahoma heretofore quoted in this brief. *Nowhere in the statute does it provide for or contemplate a formal written contract.* The statute recognizes the plans and specifications and profiles, the notices, the bids, and the awards as being quite sufficient.

The Supreme Court of Wisconsin, in the case of *Cohn et al. v. Plumer*, 60 N. W. Rep., p. 1000, considered an action upon *quantum meruit* for the value of granite furnished by plaintiffs for the building of defendant's house. Judgment was for the plaintiffs and the defendant appealed. Judgment was affirmed. The negotiations contemplated a formal written contract. Declaring the law, the court said:

"The fact that the parties to an oral contract for furnishing building material expected that a written contract, embodying the same terms, would afterwards be signed, does not prevent the oral contract from taking effect."

The Supreme Court of California, in the case of *Nash v. Kreling*, 56 Pac. 262, considered an action for the recovery of salary which was claimed was contracted for by certain correspondence. Judgment was for the plaintiff and defendant appealed. Judgment was affirmed. The facts of the case are stated in the syllabus as follows:

"Defendant, in California, had been in communication with the plaintiff, in Connecticut, looking to his engagement as state manager. Plaintiff wrote, declining previous offers, but stated he would signed a contract for a certain sum for the first year, and, if at the end of that time business should not warrant a certain raise, he would not ask it. Defendant replied by telegram, 'Your terms, \$90 a week, accepted,' and, in a letter, wrote that she had sent a telegram, which plaintiff could consider a contract until he arrived, when a proper one would be drawn up. Plaintiff became stage manager, and defendant suggested that a contract should be drawn up, but he stated it was unnecessary. *Held*, to create a contract between the parties."

Then, in discussing the matter in the body of the opinion, the court said:

“Defendant urges that they (the correspondence) were ineffectual to create any contract at all.

“We differ with defendant. After endeavors to reach an agreement, which had continued by letter and telegram, for a month prior to May 18th, it is hardly credible that the parties, or either of them, intended that plaintiff should come from the East to San Francisco to find that no agreement at all existed, or that what defendant declared to be a contract—by its terms wholly performable after plaintiff’s arrival in San Francisco—should, upon his arrival, become a nullity. Rather, we hold, the circumstances considered, the remark in defendant’s letter as to ‘drawing up one to suit,’ *had reference merely to a more formal and detailed statement of the mutual obligations of the parties, and not to the rejection or suppression of what was already agreed in writing.* Defendant relies on *Spinney vs. Downing*, 108 Cal. 666, 41 Pac. 797. It may be true, as held in that case, that, when parties to a contract intend that it shall be reduced to writing and signed by them, it is not obligatory upon either until evidenced in the manner contemplated; *but that is not saying that a contract already reduced to writing and signed, is of no binding force merely because it contemplates a subsequent and more formal instrument, as the repository of the terms of the agreement.* In a recent case, involving a contract, which, as here, rested in letters and telegrams, it was held (we quote from the headnote) that ‘a stipulation to reduce a valid written contract to some other form does not affect its validity, and the stipulation may not be used by either of the parties for the purpose of \* \* \* evading the performance of any of the provisions of the contract.’ *Sanders vs. Fruit Co.*, 144 N. Y. 209 (s. c. 39 N. E. 75). The doctrine is reasonable, and we have no doubt of its just application to the case before us. See, also, cases collected in 7 Am. & Eng. Enc. Law (2nd Ed.), pp. 140, 141.”

In this case, as said by the court, the contract was already reduced to writing and it cannot be said that it is of no binding force merely because it contemplates a subsequent and more formal instrument as a repository of the terms of the agreement.

In Volume 7 of the American & English Encyclopedia of Law, at the bottom of page 140, under the sub-heading "Future Execution of Formal Contract," the author says:

"Many cases occur where parties negotiating a contract contemplate that a formal agreement shall be drawn up and signed. The question arises, does such a contemporaneous understanding or agreement make the validity of the contract depend upon its being actually reduced to writing and signed? The true rule may be stated in these words: *Where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed on. But, where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing will not negative the existence of a present contract.*"

Note the rule stated by the author: "Where the parties make the reduction of the agreement to writing, and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon."

In order to prevent the preliminary contract where the minds have met becoming effective, the parties must



agree as a "condition precedent" that the writing shall be signed and executed, and then the author says: "But, where the parties have assented to all the terms of the contract, *the mere reference to a future contract in writing will not negative the existence of a present contract.*"

The learned Circuit Court of Appeals of the United States, in its opinion in this case has taken the position (as we read the opinion) that the mere reference to a future contract in writing of itself negatives the existence of a present contract; and this must be the position of the Honorable United States Circuit Court of Appeals, because prior to the awards as disclosed by the record, there was no intimation in any of the proceedings or negotiations that the executing and delivering of the formal written contract should be a condition precedent to the contract becoming effective. We might multiply authorities sustaining our contention in this case which either expressly or by clear inference sustain the doctrine for which we contend, but perhaps it is fair and just that we should now turn to the authorities relied upon by the appellees and cited by the Honorable United States Circuit Court of Appeals in its opinion, but which, in our judgment, are not applicable to the case at bar.

**Authorities Cited by the United States Circuit Court of Appeals.**

The court in its opinion said "*the question is whether*

*the plaintiff had such a contract as that an action for specific performance or an injunction would lie, in view of the fact that the specifications, advertisement for bids and contract prepared and regularly used by the City expressly contemplated a formal written contract."*

It will be seen that the court here puts the question squarely on the ground that the specifications, etc., expressly contemplated a formal written contract. *We say this is immaterial, unless the specifications, etc., expressly provided that the contract should not be binding until after the formal written contract was signed.* The specifications, etc., did not so provide.

The court then quotes from Dillon on Municipal Corporations (5th Edition, 810), as follows:

"After the opening of the bids, the ascertainment of the lowest or most favorable bidder and the adoption of a resolution that the contract be forwarded to him, does not make a completed contract between the municipality and the bidder where the charter requires that all contracts relating to city affairs shall be in writing, or when the advertisement so specifies."

This language simply means when the law requires a formal written contract, or when the notice or advertisement specifies that the contract shall not be binding until the formal contract is executed. The court then quotes from 7th American & English Encyclopedia of Law, 2nd Edition, page 140, and from 20th American & English Encyclopedia of Law, 2nd Edition, page 1170. The author in the second citation above says:

“Where the parties make the rendition of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until this is done.”

This statement is certainly the law, but no such condition precedent was provided for in the notices, specifications or any other instrument, or resolutions, of the City Council at or prior to the awarding of the contract.

The court then quotes from 9th Cyc., 280, as follows:

“Where parties are merely negotiating as to the terms of an agreement to be entered into between them, there is no meeting of minds while such agreement is incomplete. Thus, where they intend that their verbal negotiations shall be reduced to writing as the evidence of the terms of their agreement, there is nothing binding on them until the writing is executed.”

Of course, if the parties merely negotiated as to a matter and their minds never assented to an agreement, there is no contract, but in the case at bar the parties agreed to everything and there is no disagreement as to what was to be done even to this day. The text has no application to the case at bar.

We will now examine the opinion of different courts cited by the United States Circuit Court of Appeals in support of its decision.

The principle for which we are insisting may appear to the court to be quite elementary, and still we feel constrained to present the authorities fully as the trial court and the United States Circuit Court of Appeals failed to recognize in their decisions the distinctions clearly pointed

out in the opinions of the courts which are cited by them. We hope to be able to point out these distinctions to this court.

The Circuit Court of Appeals in its opinion cites the case of *Water Commissioners of Jersey City v. John L. Brown*, 32 N. J. Law, page 504, and we may as well here suggest that this case is the precedent for nearly all of the other cases relied upon by the appellees and which were cited by the Court of Appeals; and this New Jersey case is not in point and is clearly distinguishable from the facts in the case at bar.

The statute of New Jersey expressly provides, as the court in that case said—"in a very particular manner"—how proposals for contracts (for public improvements) are to be advertised for and made, and requires that contracts *be made in writing and that three copies of each contract shall be taken*—one to be deposited with the comptroller of Jersey City and one to be retained by the (water) commissioners.

Under the law of New Jersey, nothing except the formal written contract, executed in triplicate, could be considered; but Oklahoma has no such statute. The statute of Oklahoma was complied with to the letter without the formal written contract.

The Supreme Court of New Jersey, in the case last referred to, speaking of the statute of New Jersey, said:

"This Act specifies *in a very peculiar manner* how proposals for contracts are to be advertised for and

made, and requires the contracts *to be made in writing*, and that three copies of each contract shall be taken—one to be deposited with the comptroller of Jersey City and one to be retained by the commissioners.”

And then in the body of the opinion, on page 509, the court says, “several particulars, as to the time of finishing the work and as to the manner of doing it, and the guaranty that it would be securely and sufficiently done to cover a test of five years, remained to be settled. These matters appear to have been arranged so far as the plaintiff was concerned, and to the satisfaction of Bacot, but Bacot was not authorized to bind the board, and did not profess to do so; on the contrary, the resolutions expressly require that the contract, when adjusted to his satisfaction and the attorney’s, should be submitted to them for their approval before being executed, the evident meaning of which is, that it was to be approved and executed before it was to be binding.”

The New Jersey case, therefore, is distinguishable as to two points: First—the *statute of New Jersey made all contracts for public improvements void, except they be executed in triplicate*—one to be delivered to the comptroller, one to be retained by the commissioners and the third, of course, to be delivered to the contractor. And second—in the *New Jersey case*, the minds of the parties had not met upon all of the details. In other words, the contract itself was not consummated. The acceptance of the bid (if accepted) was conditional upon their ability to agree upon the terms of a formal written contract. In other words,

the formal written contract was a condition precedent to the consummation of the letting of the public improvements in New Jersey, made so by statute; whereas, in Oklahoma, no formal written contract is contemplated at all.

The case of *State ex rel. Shaw et al. v. Noyes et al.* (Nev.), 56 Pac. 949, involved the letting of a contract by a municipal corporation for the building of certain waterworks. The bids were submitted and a suit was brought to enjoin the letting of the contract. The council passed a resolution, pending the injunction, that it was its sense and judgment that a certain bid be accepted by certain modifications, and a contract for constructing waterworks be entered into with the bidder as soon as the city council was in law free and unrestrained to do so. At the time of the passage of the resolution the bidder had not consented to or accepted the modifications, and it was held that there was no contract between the city and the bidder so as to entitle the latter by mandamus to compel the city to execute a contract for the construction of the waterworks. In this case the city was asking for modifications which had not been assented to by the bidder, and there was no unconditional offer on the part of the one and the acceptance on the part of the other. The court in the body of the opinion said:

“The meeting of July 2, 1898, was regular, and the city council, under the provisions of that act, was authorized to accept the bid of the relators, and to make a valid and binding contract respecting the matters shown. Was such a contract made or was such

action taken by the city council and the relators at that meeting, standing alone, as would bind the city council and the relators, or create any liability under which the relators could claim any right of action? We think not. The order of the city council set up in the petition, and admitted by the respondents, was not such an acceptance of relators' bid as would, independent of subsequent action, create any liability or any right of action whatever. The bid of relators was not unconditionally accepted by the city council. It was accepted subject to certain modifications specifically set out in the order itself. No claim or showing is made, either by the pleadings or the evidence, that relators consented or agreed to, or were willing to be bound by, the modifications made; hence there was not, and could not be, any contract or liability under this order."

The court, in its opinion, clearly points out that the bid of the relators *was not unconditionally accepted by the city council*, and that it was accepted subject to certain modifications *specifically set out in the order itself*, and the court further said that no claim or showing was made, either by the pleadings or the evidence, that relators consented or agreed to, or were willing to be bound by, the modifications made; and that hence there was not, and could not be, any contract or liability under this order. Under this state of facts, this case cannot be considered as an authority in the case at bar. For in the case at bar the plans and specifications, notices and resolutions were definite and specific as to every detail, the bids were unconditional bids offering to do the work at a stated price, and the motion accepting the bids and awarding the contracts were likewise unconditional.



The case next relied upon by the United States Circuit Court of Appeals is *Eads v. City of Carondelet*, 42 Mo. 112.

Now, let us notice the point at issue in this case. The case involved the letting of a contract within the city of Carondelet, for six iron gunboats, the erection of machine shops, ways, and the construction of a boat-yard. A bid was filed and accepted by the city in the following terms:

“No. 381. An ordinance authorizing the mayor to enter into a contract with James B. Eads.

“Be it ordained by the City Council of the City of

Carondelet, as follows:

“Section I. That the proposition of James B. Eads, addressed to Dr. Wm. Taussig, bearing date 23d May, 1862, and submitted to the city council at a meeting held on said day, relative to the building within the city limits of the city of Carondelet of six iron gunboats, the erection of machine shops, ways, and the construction of a boat-yard, to be a permanent establishment for five years from said date, is hereby accepted by the city.

“Sec. II. The mayor is hereby authorized and empowered to enter into a written agreement with said James B. Eads, embracing the terms of the proposition mentioned in the first section of this ordinance, and such further conditions as may be deemed necessary, and to close the contract between said city and said Eads; he is further authorized to employ counsel for the purpose of properly drafting the contract or agreement contemplated by said proposition and this ordinance.

“Sec. III. This ordinance to take effect on and after its passage.

“Approved May 24, 1862.”

The first section of the ordinance, as will be observed, is an acceptance of the bid. The second section of the ordinance authorized and empowered the mayor to enter

into a written contract with Eads, embracing the terms of the proposition mentioned in the first section of the ordinance, and "*such further conditions as may be deemed necessary,*" and to close the contract between the said city and the said Eads, and it also empowered the mayor to employ counsel for the purpose of properly drafting the contract or agreement contemplated by said proposition and the ordinance.

The first section was an unconditional acceptance of the bid. The second section provided that the mayor should draw a contract embracing the matters in the first section, and such other terms and conditions as might be deemed necessary. *The court in passing upon the questions involved, expressly said that if it were at liberty to construe the first section of the ordinance alone and wholly disregard the other parts, it would find no difficulty in finding the existence of a valid contract.*

The first section, unmodified by the second section of the ordinance, presents exactly the condition involved in the case at bar. The bid was an unconditional bid, and the acceptance was an unconditional acceptance, and in addition to accepting the bid, the City Council of Oklahoma City expressly awarded the contracts to David McCormick.

The Supreme Court of Missouri, however, in passing upon this case, used the following language:

"The question here does not relate to the meaning or interpretation of the supposed contract, but is whether

there was any contract made and entered into which was binding on the parties. There can be no valid contract unless the parties thereto assent, and they must assent to the same thing in the same sense. (1 Pars. on Cont. 475; 1 Sto. on Cont., Sec. 378; Hazard vs. New England Marine Ins. Co., 1 Sum. 218; Greene vs. Bateman, 2 Woodb. & M. 359; Barlow vs. Scott, 24 N. Y. 40.) In Honeyman vs. Marratt, 6 H. L. Cas. 112, a proposition to sell real estate was accepted, subject to the terms of a contract to be arranged between the parties, and it was held that there was no complete contract in the case. An absolute acceptance of a proposal, coupled with any qualification or condition, will not be regarded as a complete contract, because there at no time exists the requisite mutual assent to the same thing in the same sense. And when a parol agreement is assented to, which it is understood between the parties is to be put into writing, it is not binding till it is put in that form. *If we were at liberty to construe the first section of the ordinance alone, and wholly disregard the other parts, we should find no difficulty in finding the existence of a valid contract.* But this we cannot do; the whole ordinance must be taken together to ascertain with what intent it was framed, and what was necessary to be done to carry it into execution and impart to it validity and force. After accepting the proposition of Eads in the first section, the second section proceeds to provide the means for carrying out that acceptance, not merely or exclusively on the terms proposed, but on such further conditions as may be deemed necessary. The mayor is authorized and empowered to enter into a written agreement with Eads, embracing the items of the proposition mentioned in the first section of the ordinance; and, to superadd further conditions which may be deemed necessary for the purpose of properly drafting the contemplated agreement, he is authorized to employ counsel. *A written agreement is expressly provided for and contemplated, with such conditions as the mayor, acting for and in behalf of the city, might deem advisable.* The ordinance was at once communicated to Eads, and he saw the terms and conditions annexed to

the acceptance of his proposition. If he intended to hold the city, it was his duty to have the terms agreed upon and the contract closed by writing."

It is true, that in the body of the opinion the court said "and when a parol agreement is assented to, which it is understood between the parties is to be put into writing, it is not binding until it is put in that form."

The court does not cite a single authority in support of this statement, and the statement must be considered in connection with the facts of that particular case, and the facts of that case were that the minds of the parties had not agreed, because the court says at the end of the opinion: "*A written agreement is expressly provided for and contemplated, with such conditions as the mayor, acting for and in behalf of the city, might deem advisable.* The ordinance was at once communicated to Eads, and he saw the terms and conditions annexed to the acceptance of his proposition. If he intended to hold the city, it was his duty to have the terms agreed upon and the contract closed by writing."

Clearly the parties had never agreed to the terms of the contract, but the court said if section one were taken alone, unmodified by section two, that it would hold that it constituted a valid and binding contract between the city and Eads.

And then again, the Supreme Court of Missouri, in the subsequent case of *Green et al. v. Cole* (Missouri), 15

S. W. 317, commented upon the case of *Eads v. City of Carondelet*, 42 Mo. 113, saying:

“We do not regard the case of *Eads*, etc., as in conflict with what has been said, for that case proceeds upon the ground that all of the terms of the contract had not been settled, for the mayor was authorized to make a contract ‘with such further conditions as may be deemed necessary.’ The court in the case last referred to lays down the doctrine for which we here contend.”

The United States Circuit Court of Appeals next cites the case of *James Starkey v. The City of Minneapolis*, 19th Missouri Reports, page 203. That suit was an action by the plaintiff to recover damages from the defendant because of its refusal to permit him to do certain work for it. The court assumed that the defendant City of Minneapolis was as free to contract in respect to work as if it were a private person. The plaintiff alleged that the city advertised, inviting proposals for the work, reserving the right to reject any and all bids. There was nothing in the defendant’s charter which compelled it to advertise for bids. It was not bound to accept the offer because it was the lowest. And the court in commenting upon the facts of the case said:

“The advertisement was but a question addressed to the plaintiff, as one of the public, whereby the defendant asked him to state the terms upon which he would do the work, when and as specified. But it did not bind the defendant to employ the plaintiff, if his should be the lowest bid, to construct the sewer, nor to construct the sewer at all. The written proposal of the plaintiff was not responsive to the question. That referred to a sewer to be built on Third street, according

to the plans, etc., on or before September 30th, the contractor giving bonds, etc. The offer is to build 'the sewers in Minneapolis according to the plans and specifications,' at certain specified rates. Whether or not the plaintiff meant this for an offer to build a sewer on Third street by September 30th, etc., is not the question. He does not offer to do it.

"So far, then, we have nothing but an offer by plaintiff to build the sewers in Minneapolis at certain specified rates. To make this obligatory upon the plaintiff, it must have been accepted by the defendant by a simple acceptance, without the introduction of any new terms."

The converse of the statement of law embraced in the language just quoted clearly is that if the contractor had made a definite, positive offer to do a specific piece of work, and the city had unconditionally accepted that offer, that it would constitute a valid and binding contract. Then the court said what occurred was neither an acceptance of the plaintiff's offer to build the sewers in Minneapolis, nor a promise, nor an offer made to him. And finally the court said: "In the present case, for instance, if it was meant by plaintiff, and so understood by defendant, that he offered to build the Third street sewer at those prices by September 30th, and giving bond therefor to defendant's satisfaction in \$10,000 and that the defendant accepted his offer as meant, why not say so?"

"We must conclude on these pleadings that it was because the fact was otherwise. But the complaint proceeds to say 'to which award this plaintiff then and there duly assented and consented to the same.' That is to say, that

plaintiff 'assented and consented' to the defendant's decision to agree with him for the performance of this work."

In other words, there was never a definite offer and a definite acceptance of that offer. The minds of the parties had never met and agreed upon what should be done. And then, again, the decision is based upon the further ground that the Special Laws, 1867, chapter 19, of Missouri, *expressly require that contracts entered into by the common council on behalf of the city, with a third person, for 'the opening, repairing, grading and cleansing of the streets, alleys, public grounds, sewers and sidewalks within the city, to be valid must be in writing.* The statute of Missouri expressly required the contract to be in writing and therefore the decision is not in point with the case at bar, which arose in a state that had no such a statute.

The next case cited by the Honorable United States Circuit Court of Appeals is that of *Mississippi & Dominion Steamship Co., Ltd., v. Swift et al.*, 29th Atlantic, p. 1063, 86 Maine 248. This involved an alleged contract for the shipping of fresh meats, and was for the recovery of \$24,690.08 damages for the breach of the alleged contract. The question presented was as to whether or not a contract had been consummated. Negotiations were merely by correspondence and the court gives the substance of this correspondence in the following language:

"The correspondence seems to indicate that a formal draft of the contract was in the minds of the parties, or at least in the mind of the defendants, as the only



authoritative evidence of a contract. In the first letter—that of November 19th—Torrance & Co., the plaintiff's agents, write that they are authorized 'to make a contract for dressed beef on our steamers Sarnia and Oregon, and we hasten to advise you that we are prepared to discuss the matter with you.' In the second letter they invite a bid. In the letter of March 3, 1890, they name terms, and then say, 'If you are inclined to do anything on these terms, you might further communicate with us, or our Portland house.' In the letter of March 24th, from Portland, they say, 'We would not be prepared to enter into a contract with you for the Vancouver, Sarnia and Oregon, unless for one year, from Montreal during the summer, and Portland in winter, we reserving the right to withdraw Vancouver during the winter.' In the letter of April 1st, they say, 'You can arrange with our Portland house in reference to the contract.' July 8th the defendants wired for a copy of the contract to be sent. On the same day, Torrance & Co. write, apologizing for neglect to send copy. July 10th, Torrance & Co. send the written draft which had been above described, and write, 'We now enclose you copy of our proposed contract, which we trust may be found in accordance with the understanding arrived at last March.' "

But even with this correspondence, which nowhere purported to conclude an agreement, the court said: "The case is by no means free from doubt and difficulty, but due reflection and study of the evidence has at last brought us to the conclusion that what the plaintiff claims to have become a perfected contract on April 5, 1890, by the defendant's letter of that date, was at the most only the acceptance of the proposed basis of a contract, which was yet to be perfected as to details and put in writing, and that the defendants did not have, nor signify, any intention

to be bound until the written draft had been made and signed.”

The opinion shows right upon its face, by express language to that effect, that the contract was not perfected as to details, that it was merely a general understanding that they desired to enter into an agreement and were willing to do so, but the details of the trade were not settled. The contract if made was to be put in writing, but as they had never agreed upon the terms of the contract, it could not be reduced to writing, and hence no contract.

The Maine court, however, in its opinion cites the case of *Eads v. Carondelet*, 42 Mo. 113, and *Commissioners v. Brown*, 32 N. J. 504, *supra*. Each of these cases we have heretofore commented upon and have shown that they have no application to the case at bar.

The letter of July 5th, which it was contended consummated the contract, was as follows:

“Your favor of April 1st received. Replying to same, will say we will arrange for fitting the three ships by the Kilbourne process, as per your request. I notice you say: ‘The Toronto, one of our steamers sailing between here and Liverpool all next season, is due at Portland on the 10th instant, and should sail about the 15th. We are open to negotiations for her, if you are so inclined.’ I suppose ‘all next season’ means the coming summer navigation for Montreal. Will you kindly write us, saying where this ship will sail from during next winter. If she is to be in the regular service, we shall be pleased to negotiate with you.”

It will be seen that there is nothing in this letter which purported to conclude any contract or to definitely accept

any proposition, and as will be seen by the opinion, it was contended that the contract became perfected by the letter of April 5, 1890. The latter is neither a definite proposition, nor a definite acceptance of anything. Because the minds of the parties did not meet, and they did not agree upon any proposition, the court held that the contract was not concluded, and therefore judgment was rendered in favor of the defendant, and that judgment was affirmed.

The case last referred to also cites in addition to the 42nd Missouri and the 32nd New Jersey Law, the case of *Congdon v. Darcy*, 46th Vermont 478, and this last case is also cited by the United States Circuit Court of Appeals. Let us now observe this case and see whether or not it is applicable to the case at bar. That case involved the erection of a building. The details were all agreed to, leaving open the question whether the contract should or should not be reduced to writing, which was to be as the defendant desired. That is to say—that if he desired a written contract drawn up, duly executed, as a condition precedent to the consummation of the contract, he had the right to have it done that way. No contract in fact was ever drawn up and signed. The defendant declined to give the work to the plaintiff and he brought suit. Running all through the opinion is, we think, a clear intimation that it was the intention of the parties that the executing of the formal written contract was a condition precedent to the consummation of the contract to build. It is also indicated by the opinion, that under the statute of frauds of Vermont, a

contract of this kind not in writing would be void, because the court in the body of the opinion said:

“If they (referring to the delivery of certain bills of lumber, etc.) had been delivered by the plaintiff at the request of the defendant, they would not have rendered the contract operative between them, because the act of reducing the contract to writing and of signing it, still remained to be performed, and for that reason there was no perfected, unwritten contract, which by part performance could be taken from the operation of the statute of frauds.”

Thus it will be seen that the statute of that state must have provided that a contract of this character must be in writing. The court, recognizing that it was the intention of the parties that the written instrument should be required at the option of one of the parties to consummate the contract, held that inasmuch as the written instrument was not executed, there was no contract.

The next case cited in the opinion is that of *Hodges et al. v. Sublett* (Alabama), 8 Southern Reporter, page 800, 91 Alabama 588. The plaintiff told the defendant he would make certain changes in a building for a stated sum. The defendants said that the price was satisfactory, but before they would bind themselves they must see other interested parties, and for plaintiff to write out the contract and send it over to be signed. The contract was not signed, nor any other entered into. The plaintiff went ahead and did the work, with the knowledge of the defendants. The court said the defendants were not liable. Judgment was for the plaintiff and the case was reversed, because the parties

had not agreed as to the terms of the contract. The court said:

“Whether there was a complete contract between appellee, who is the plaintiff in the circuit court, and Hodges and Bain, against whom the suit was originally brought, for the erection, for the use as a Masonic hall, of a second story on a church, which plaintiff and one Coleman were at the time engaged in building, is the material and controlling question in the case. *This depends mainly upon the further question whether it was meant and understood by the parties that the agreement should not be binding until it was reduced to writing, and signed by them.* It is an elementary principle that the mutual assent of the parties to the same thing, and in the same sense, is an essential element of every contract. When the parties orally agree upon the terms of the contract, and there is a final assent thereto, so that no variation can be introduced into the writing except by mutual consent, the mere suggestion or intention to put it in writing at a subsequent time is not, of itself, sufficient to show that they did not mean the parol contract to be complete and binding without being put in writing. *Parties may, however, agree verbally upon the terms of a contract, and yet stipulate that it is not to be binding until put in writing,* in which case such stipulation becomes an operative term of the contract, and, unless reduced to writing, and signed by the parties, it does not constitute a complete and binding agreement.”

The court, it will be observed, said that as to whether or not there was a contract “depended mainly upon the further question whether it was meant and understood by the parties that the agreement should not be binding until it was reduced to writing and signed by them.” Then the court said “when the parties orally agree upon the terms of the contract, and there is a final assent thereto, so that no variation can be introduced into the writing except by

mutual consent, the mere suggestion or intention to put it in writing at a subsequent time is not, of itself, sufficient to show that they did not mean the parol contract to be complete and binding without being put in writing." In the case at bar there could be no variations or changes, because every detail of the work was provided for. The court, however, in this opinion said "that parties may, however, agree verbally upon the terms of a contract, and yet stipulate that it is not to be binding until put in writing," and then it says "in which case such stipulation becomes an operative term of the contract, and unless reduced to writing and signed by the parties, it does not constitute a complete and binding agreement." But where the terms of an agreement are assented to, accompanied by a mutual agreement that it shall be reduced to writing, the contract will be in law presumed to be completed in the absence of the written contract, *unless it be affirmatively shown by the one denying the contract, that it was agreed that the contract should be reduced to writing before it should become operative.* This rule is clearly established by the large number of authorities we have heretofore cited.

The next case cited by the United States Circuit Court of Appeals is that of *Mann et al. v. Incorporated Town of Rochester*, 29 Indiana App. 12, 63 N. E. Rep. 874. This involved an alleged contract for the building of a system of waterworks. The board of trustees procured plans and specifications for the proposed system of waterworks and caused the same to be filed with the clerk of the board, ac-

ording to law. The board merely gave notice by publication in a newspaper, advising that sealed bids would be received by said board up to noon, April 25, 1893, and the bids would be opened at eight o'clock p. m. the same day, for the construction of a complete system of waterworks for the town. The notice also provided the kind and character of work and that bids would be received for the material and work separately, or for the work constructed complete; that each bid must be accompanied with a certified check, or its equivalent; that the amount was named in the general specifications; that the plans might be seen and specifications procured at the office of the clerk of said board, or at the office of the engineer named, at Buffalo, New York, reserving the right to reject any and all bids. The notice was signed by the president and secretary of the board. A proposal was made to do the work and that proposal was accepted by the council. If the law of Indiana were the same as the law of Oklahoma, this decision under this state of facts might have some weight, but the court, after stating the substance of the statute of Indiana, said:

“It is the purpose of the statute that a contract shall be made, and an acceptable bond shall be received, before the bidder shall acquire any right to perform the work. His right is not fixed by the ascertainment that he is the lowest bidder.”

And then the court in concluding the opinion uses the following language:



"It is the manifest meaning of the statute that the contract provided for thereby shall be a contract in writing, and it sufficiently appears to have been the purpose of the parties that the terms agreed upon by them should be reduced to writing, and should be signed by them, before the contract would be considered as completely made; and where such is the case, especially if one of the parties be acting in a public capacity, all that goes before such completion must be regarded as negotiations for a contract, or steps leading to a contract. When all was done, something remained to complete the contemplated contract." (Citing cases.)

First—The statute required the contract to be in writing, that is, one formal instrument, and the court held that where the law required such a contract to be in writing and signed by the respective parties, that all that preceded the formal signing of the contract would be considered merely as negotiations. This case, like practically all of the others cited by the Court of Appeals, is controlled by statute requiring as a condition precedent to the consummation of the contract, *the signing of a written contract*. In Oklahoma there is no such a statute. All was done in the case at bar that the law requires.

The next case cited by the United States Circuit Court of Appeals is *Edge Moor Bridge Works v. Inhabitants of Bristol County*, 170 Mass. 528, 49 N. E. 918.

This was an action on contract in which the plaintiff in its declaration alleged that the defendant, by the county commissioners, had advertised for proposals for the building of a bridge; that plaintiff submitted a proposal and complied with all the conditions of the advertisement, and

that afterwards the commissioners voted to accept plaintiff's bid, subject to certain conditions involving an acceptance by plaintiff of the condition that the contract should depend on certain legislative action; that plaintiff agreed to such condition, but the commissioners refused to award plaintiff the contract.

The court said: "The ground of action relied on by the plaintiff corporation is not that the county commissioners actually entered into a contract with it, under which it was to do the work, but that they agreed to enter into such a contract, and afterwards refused to do so. To support this view, the plaintiff relies on the vote of the county commissioners accepting its bid and awarding the contract. We have therefore to consider whether, in view of the circumstances, the vote bears that construction. The vote is to be construed with reference to the advertisements under which the proposals of the plaintiff were submitted."

And then the court said:

"Where proposals and an award made thereon look to the future execution of the contract, such award is not necessarily a contract of any kind, nor an agreement to enter into a contract based on the proposals; it is, at most, a matter to be determined whether such agreement exists upon a consideration of the terms and purpose of the award, construed in the light of the existing circumstances."

Note how carefully the court guards the statement which it makes with reference to an award. It said "such

award is not *necessarily* a contract of any kind, nor an agreement to enter into a contract based upon the proposals."

And then the court in further commenting upon this award in this case, as in the others, shows that the only way the board of county commissioners could enter into such contract, where it involved more than \$800, *was by writing*. The court said:

"By St. 1897, c. 137, Sec. 22, it was provided that all contracts made by county commissioners for the construction of public works, if exceeding \$800.00 in amount, shall be made in writing, after notice for proposals therefor has been published; that all proposals shall be publicly opened, in the presence of a majority of the commissioners, and a record thereof made upon their record; that all such contracts shall be in writing, *and recorded in a book to be kept for the purpose with the records of the county; and that no contract made in violation of the provisions of this section shall be valid against the county, and no payment thereon shall be made from the county treasury.* By St. 1897, c. 153, a greatly increased strictness was established in respect to expenditures by counties, and the duties of county commissioners in respect thereto were defined, and their powers limited. *In these statutes the purpose of the legislature to prevent wasteful or unnecessary county expenses is clearly manifested, and it is open to doubt whether it would now be in the power of county commissioners to build a county by a preliminary agreement to enter into a future contract for the construction of a public work.* This question, however, need not now be determined, because it is quite obvious that the county commissioners of Bristol County were seeking to conform carefully to the spirit of the provisions of the statutes, and that by their vote they did not intend to bind the county by a preliminary agreement, such as that upon which the plaintiff relies. Judgment for defendants affirmed."

It will be seen from the language quoted above that under the statute of Massachusetts, where the case arose, provided, as the court said, that no contract made in violation of the provisions of this section shall be valid against the county, and no payment thereon shall be made from the county treasury. By the statute of that state, the contract not only had to be in writing, in a formal way executed by the parties, but it had to be recorded in a book to be kept for the purpose in the records of the county; and the court also shows that by the statute of 1897, chapter 153: "A greatly increased strictness was established in respect to expenditures by counties," etc. It is inconceivable, to our minds, that this decision can be regarded as an authority upon the point that the contract alleged and set forth in the bill in the case at bar was not binding because the formal written contract contemplated thereby was never executed.

The next case cited in the opinion of the court below is that of *Dunham v. City of Boston* (Mass.), 12 Allen's Reports 375. The syllabus of the case states the facts:

"A city ordinance provided that the land commissioners of the city should have the disposal of the public lands, subject to the approval of the mayor. The city council authorized the land commissioners to sell a certain lot of land on the same terms as they were authorized to sell the public lands. A. made to them a written offer for it. The land commissioner passed a vote recommending the sale of the interest of the city in the lot to A. for the price offered by him. This vote was sent to the mayor, who wrote his approval upon it. A deed to the lot to A. was accordingly prepared by the city solicitor, but was never

signed. *Held*, that there was no contract on the part of the city, of which A. could enforce specific performance."

The entire opinion in the case, which was by Chapman, J., is as follows:

"The court are of the opinion that the evidence does not prove that the defendants contracted with the plaintiff for the sale of the land to him. The vote passed on the 11th of August does not import a contract, even when approved by the mayor. It was not communicated to the plaintiff as a contract, and it does not appear that it was intended to be so. On the contrary, it was to be communicated to the proper officers of the city as an authority to them to execute a deed, and it contemplates the deed as the only contract which the city was to make with the plaintiff. It was thus a mere preliminary to the completion of the contract. This construction of the vote makes all the other points that have been argued immaterial."

Thus it will be seen that a party merely made an offer to the city for a lot. The land commissioners of the city passed a vote, recommending the sale of the lot to the party. It was then up to the mayor to execute a deed if he desired to do so. That recommendation, however, was to an officer of the city and did not constitute an acceptance of the offer, nor did it purport to do so, as said by the court. There was no element of a contract in the case at all. It is not an authority on the facts in the case at bar.

The next case cited by the Honorable Court of Appeals is that of *Town of Hamilton v. Chopard et al.* 9th Wash-

ington 352, 37 Pacific 472. The action was by the town of Hamilton against L. Chopard and wife and Frank Wilkerson and wife, to foreclose a lien growing out of an assessment. Judgment was rendered for the defendants and plaintiff appealed. The judgment was affirmed. The action was brought by the appellant to foreclose an alleged lien growing out of an attempted assessment for the improvement of one of its streets. The formal allegations of the complaint as to the incorporation of appellant, and other matters of this kind, were admitted, but the allegations as to the improvement of the street and the making of an assessment to pay for the same were denied. Upon the issues thus made, the cause went to trial.

The court said the plaintiff put in evidence: "First—A general ordinance, prescribing the method by which its streets should be improved, and assessments therefor made. (It was not an ordinance prescribing the manner in which the actual improvements should be made.) Second—The minutes of the meeting of its common council, from which it only appeared that certain bids for the improvement of Cumberland Street were opened in the presence of the council and that of W. W. Hakes accepted. These minutes do not contain the amount of any of the bids submitted, so that the acceptance of the bid of W. W. Hakes in no manner informed the court, or anybody else, of the amount for which he was to do the work specified in the contract. Plaintiff next introduced what is denominated in the statement of facts as 'The Street Assessment Roll for Cumberland

Street,' but which was in the shape of a book, with certain columns marked and ruled upon it, from which it only appeared that such columns were headed respectively with the words, 'Name,' 'Lot,' 'Block,' 'Addition,' 'Street,' 'Feet,' 'Amount,' 'Residence,' and thereunder respectively, 'L. Chopard,' '20,' '16,' 'Second,' 'Cumberland,' '100,' '70.95,' 'Seattle;' and this was all the information that could be gained from the so-called 'assessment roll.' "

There was no other evidence of any improvement. The court merely said that the proof above set forth was not sufficient to establish a lien. It nowhere appeared therefrom that any contract for the improvement of the street had ever been entered into. The court in this case was not discussing a written contract. It had reference to the proceeding disclosed by the record, and it is specifically stated in the syllabus of the opinion that the record failed to show the amount of the bid. The court does not pretend to pass upon whether or not a formal written contract was necessary. That question was not involved in that case. The proceedings of the council which were shown were not sufficient to constitute a contract, because they were irregular, and were not complete, and besides, the assessment roll which was submitted and introduced in evidence, the court said was in no way authenticated and it was therefore not entitled to credence. The city in that case had to establish that a lien existed. It failed to do so, but the court nowhere held that if resolutions were properly passed, specifications and plans adopted, notices



properly given, specific and definite bid filed to do the work, and that bid unconditionally accepted, it would not constitute a valid and binding contract. There is no such intimation in the opinion.

And the last case cited in support of the opinion by the Honorable Circuit Court of Appeals is that of *State ex rel. Cleveland Trinidad Paving Co. v. Board of Public Service of Columbus* (Ohio), 81 Ohio State 218, 90 N. E. Rep. 389, and the court says in the opinion:

“In the latter case (referring to the case just cited), where there was no notification by the council to the bidder, it was held that it did not constitute an agreement.”

The court overlooked the fact that the statute of Ohio definitely and specifically requires that such a notice be given by the council to the bidder. There is no such a statute in Oklahoma. The only notice required by the statute of Oklahoma to the bidder of the acceptance of his bid and the awarding of the contract, is the notice that was published in the case at bar, notifying bidders generally *that their bids would be opened on a certain date and the contract awarded*. This was notice for them to be present at the opening of the bids, to the end that they might know to whom the contracts were awarded. Let us examine this case last referred to a little further.

The suit was an action by the state on the relation of the Cleveland Trinidad Paving Company for a writ of manda-

mus to the Board of Public Service of Columbus. The relators sought to compel the execution by defendant of a paving contract with the relators. The board duly advertised for bids and the notice provided that if the bid should be accepted the contract should be entered into within five days after notification of acceptance from the board. The relator was the lowest and best bidder for the improvements and the board upon canvassing the bids, by resolution duly adopted, found and decided that the bid of the relator was the lowest and best bid and ordered that a contract be entered into with relator for the improvements, on relator giving a satisfactory bond in an amount required, within five days from that date. And the clerk was ordered to transmit a copy of the resolution to relator. But the defendant did not cause said clerk to transmit a copy of the resolution to relator, and did not give to relator any notice that relator's bid was accepted. And then later the defendant, by resolution then adopted, set aside the award of said contract with relator, and ordered that the work be again advertised for bids.

The court in commenting upon this case said:

“The question would seem to be answered by a consideration of Section 1536-679, Revised Statutes (Sec. 143, Municipal Code), which, among other things, provides that the directors of public service may make any contract for the work, under the supervision of the department, not involving more than \$500, but that when such expenditure will exceed that sum, the expenditure shall first be authorized and directed by ordinance of council.”

Then follow directions as to advertising for bids, specifications of what the bid shall contain, for check or bond to accompany the same, for the opening of bids, *that the board shall make a written contract with the lowest and best bidder*, but that the board may reject any and all bids.

The relator contended that the proceedings of the city council constituted a valid and binding contract. The court, however, said: "There is apparent plausibility in this claim, but is it sound? It seems to us, not. The weakness fatal, as we think, lies in the assumption that the board had done all that the statute requires in order to bind it." (In the case at bar all had been done that the statute required.) "That its resolution implied an acceptance of the company's offer, and that there followed an acceptance by the company of the board's resolution and implied offer. Neither condition existed. The act of the board lacked *one essential element contemplated by the statute*, and required by the advertisement to be done by the board, viz., *notification to relator of the passage of the resolution finding relator to be the lowest and best bidder*. To fairly make the question which the counsel argue, the element of notification should be present. At least, until notification has been made, it could not be claimed with reason that there had been any acceptance by the board of the company's proposition. In no just sense can it be said that the resolution was conclusive or binding on the board. It was in effect a mere mental assent on the part of the board, unexpressed by any act which would conclude the negotiation or bind the parties. *Nor*

*was there any acceptance by the company, the attempt to do so having been made after the board had rescinded the only action taken, which is claimed for the basis of a contract. So there was in fact no tender."*

And then the court further on in the opinion clearly shows that the decision is based upon the statute of Ohio. It says:

"In this case, under the statute cited, it is quite clear that the real substantial object to be attained is the making of the written contract. It is the only contract authorized by the statute, and all that precedes is but preliminary to the efficient object, viz., the written contract. Until that is executed the city is not bound. In the present case the board was authorized to bind the city by the written contract specified in the statute, but was wholly unauthorized to bind the city by any other contract."

Could language be more definite and positive? The Supreme Court of Ohio bases its decision squarely upon a statute which prohibited the making of a contract *other wise than in writing, duly signed by the parties*, and as was said in one other case upon which we have already commented, if the statute of the state provides that the contract authorizing the making of a public improvement must be in writing, duly signed by the parties, in addition to the proceedings of the council and the letting and awarding of the bid, as was the case in nearly every decision cited by the lower court, then of course all that precedes the executing of the written contract must be regarded merely as negotiation.

After examining carefully every decision cited in support of the opinion by the Circuit Court of Appeals, we must earnestly insist that not a single one of them sustains the conclusion reached by the court, but on the contrary, the great weight of authority, as shown by the cases hereinabove cited, shows that the resolutions of the city council, the plans, specifications and profiles, the notices, the bids, the acceptance of those bids and the awarding of those contracts by the City to David McCormick constituted valid and binding contracts, and these proceedings are all that the contemplated by the statute of Oklahoma, and the mere referring to a future contract in no way detracts from the valid and binding contract already assented to and agreed to by both the City and David McCormick, and which contract was in writing and covered every detail of the work.

**Appellant Entitled to Damages if Equity Relief  
Cannot Be Granted.**

*FIFTH PROPOSITION: If appellees have made it impossible for equity to grant relief prayed for pending the suit, the court should assess against them the damages sustained by appellant.*

On the final trial of the case, it being made to appear that the streets involved in the various contracts awarded to David McCormick by the Mayor and City Council, had been paved by The Conway Company, under a subsequent pretended contract between it and the City of Oklahoma

City, the appellant, David McCormick, through his attorneys, requested the court to retain jurisdiction and to determine from the evidence the damages which David McCormick had sustained by reason of the wrongful acts on behalf of the City, The Conway Company, and the other appellees by reason of their preventing him from carrying out his contract with the City for the paving of such streets.

This question is presented by the 6th Assignment of Error, page 179 of the printed record, and is as follows:

"On this the 25th day of July, 1911, comes the plaintiff by its solicitors and shows that the decree entered in the above cause on the 7th day of June, 1911, is erroneous and unjust to the plaintiff. \* \* \*

"6th: Because the court erred in holding that under the evidence in this case showing that after the defendant city had made awards to the plaintiff and entered into a contract with him, to construct the improvements set out in the bill, and the said City after having entered into such contract, rendered it impossible as shown by the evidence in this case, for the plaintiff to perform his part of the contract, by making a pretended award for the construction of the improvements to the Conway Paving Company to construct said improvements, and the court erred in holding that the plaintiff was not entitled to the equitable relief prayed by him in his bill, and refused in this action to assess such damages as the plaintiff has suffered by reason of the wrongful acts of the said City of Oklahoma City and its officers and the defendants in this case in refusing to permit plaintiff to perform said contracts awarded to him as shown by the evidence."

It was the contention of the appellant, David McCormick, on the final trial that if the appellees had made it

impossible for the appellant to carry out his contract and the conditions were such as would entitle him to the relief prayed for when his bill was originally filed and he had suffered damages by reason of the acts of the appellees in refusing to permit him to carry out the contract entered into between the City of Oklahoma City and him as evidenced by the published notice, the plans and specifications, the bid of David McCormick, and the acceptance of his bids and the award of the contracts for the various streets in controversy to him, then and in that event it was the duty of the court, although he could not grant the particular equitable relief prayed, to retain jurisdiction of the case, hear the evidence and to assess whatever damages the appellant may have sustained by reason of the wrongful acts of the appellees. This the court declined to do and the appellant insists that this was error, and that he was entitled to that relief and in support of this position we desire to direct the court's attention to a number of decisions laying down this rule.

In the case of *Milkman v. Ordway*, 106 Mass. 232, the court, speaking through Mr. Justice Wells, said:

"It is settled with little or no conflict of authority, that when a defendant in a bill in equity, disenables himself pending the suit, to comply with an order for specific relief, the court will proceed to offer relief by way of compelling compensation to be made and for this purpose will retain the bill and determine the amount of such compensation although its nature and measure are precisely the same as the party would otherwise recover as damages in an action at

law. The character of the investigation is, therefore, not an insuperable objection to this mode of proceeding.

“There is also authority, though apparently questioned in the English decisions, for the application of the same rule when the disability was caused before suit, but after the date of the agreement relied on. In this country it seems to be generally accepted as the rule, provided the plaintiff brought his bill without knowledge of the disability, in good faith, seeking equitable relief, supposing and having reason to suppose himself entitled to such equitable relief.

“In the opinion of the majority of this court, there is equal ground in equity for applying the same rule, with the same qualifications, to all cases where a defect of title, right or capacity in the defendant to fulfill his contract is developed by his answer, or in the court of the hearing, or upon reference of his title or capacity, after an order of fulfillment.

“The rule assumes, of course, a sufficient contract, performance or an offer to perform by the plaintiff, and every other element requisite, on his part, to the cognizance of his case in chancery; and that the special relief sought is defeated, not by any defense or counter-equities, but simply because an order therefor would be fruitless, from the inability of the defendant to comply. The jurisdiction is fixed by establishing the equitable right of the plaintiff. Relief might then be given by a decree in the alternative, awarding damages unless the defendant should secure the specific performance sought. In many cases, this would be an effective and proper course, inasmuch as the defendant, although not having himself, at the time, the title or capacity requisite for such performance, might be able to procure it otherwise. The jurisdiction is not lost, when the court instead of such alternative decree, determines to proceed directly to an award of damages or compensation. The peculiar province of a court of chancery is, to adapt its remedies to the



circumstances of each case as developed by the trial. It is acting within that province when it administers a remedy in damages merely, in favor of a plaintiff who fails of other equitable relief, to which he is entitled, without fault on his own part. The diversity of practice in this respect, and the doubt as to the jurisdiction, we think must have arisen less from the nature of the relief to be afforded than from the character of the means for determining the amount of compensation to be rendered."

Again, in the case of *Woodbury v. Marble Head Water Co.* (Mass.), 15 N. E. 282, the court said:

"On a bill to restrain the water company from maintaining its pipes, etc., on plaintiff's land, it appeared the original description of the land taken was not sufficiently accurate for identification, but that after the bill was filed, the company had made a new taking and had filed a complete description of the land with the exception that the names of the owners were omitted. *Held*, that injunction would not be granted but that the bill might be retained for the assessment of damages if not in respect to the entry before the lawful taking."

The physical conditions were such at the time of the filing of the bill on January 30, 1909, that if the defendants had not interfered with the complainant, he could have carried out his contract and paved the streets as he was in duty bound to do under the contract entered into with the City, but he was prevented from paving the streets only by reason of the wrongful acts of the city and of the other defendants in preventing him from doing so.

This changed condition by reason of the wrongful acts of the defendants would entitle the plaintiff to have his damages assessed and judgment entered therefor in his

favor instead of granting the injunction as originally prayed.

Another case sustaining this position is that of *Van Allen v. New York Elevated Railroad Company et al.*, 38 N. E. 997, decided by the Court of Appeals of New York, on December 11, 1894. In that case the court said:

“The plaintiff had the legal title to the premises at the time of the commencement of the action, and that the jurisdiction of equity then attached cannot be and is not questioned. The jurisdiction of equity depends upon the position of the plaintiff and the relief to which he is entitled at the time the suit is brought. The measure of the relief is adapted to the situation at the time of the decree. When the jurisdiction has once attached, it is not affected by changes which occur subsequently, so long as any cause of action survives, upon the facts alleged, though such changes may affect the nature and extent of the relief to which the party may be entitled. No principle is so well established or more frequently asserted as that, when a court of equity has once acquired jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue. *McGean v. Railway Co.*, 133 N. Y. 16, 30 N. E. 647; *Valentine v. Richardt*, 126 N. Y. 272, 27 N. E. 255. This feature of equity jurisdiction is well illustrated in actions for the specific performance of contracts for the sale of lands, where it appears upon the trial that the defendant has, for some reason, always been unable to perform, but that fact was not known to the plaintiff at the time of the commencement of the action. In such cases the court will grant a decree for simple damages, because the plaintiff came into equity in good faith. *Holland v. Worley*, 26 Ch. Div. 578; *Catton v. Weld*, 32 Beav. 266; *Betts v. Nielson*, 3 Ch. App. 429; *Pratt v. Law*, 9 Cranch 456, 494; *Mobile Co. v. Kimball*, 1 Otto. U. S. 691; *Milkman v. Ord-*

way, 106 Mass. 232; Tainter v. Cole, 120 Mass. 162; Wanson v. Fenno, 129 Mass. 405; Ostrander v. Webber, 114 N. Y. 95, 21 N. E. 112; Beck v. Allison, 56 N. Y. 366; New York Ice Co. v. N. W. Insurance Co., 23 N. Y. 357. The sole ground upon which the plaintiff was permitted to invoke the jurisdiction of equity may no longer exist in consequence of events which have transpired subsequent to the commencement of the action; but that fact alone will not deprive the court of the jurisdiction which has once attached, so long as there still remains any injury to be redressed, though as to that, there may be an adequate remedy at law. The court in such cases will not send the party to another tribunal for relief, but, as in cases where the jurisdiction rests solely upon a demand to restrain the infringement of a patent which expired *pendente lite*, damages will be awarded."

The Supreme Court of Missouri, in the case of *Leo, B. Holland v. David Andrews et al.*, 38 Mo. Rep., marginal page 55, bottom of page 34, declared the same rule for which we here contend in the following language:

"This was a suit in the nature of a bill in equity, for rescission and cancellation of a contract in respect of an exchange of lands. The petition asked for rescinding the contract, and also prayed for general relief; but it was admitted on argument that the prayer for rescission could not be granted, because the property had been changed in such a manner that it was impossible to have it restored. But it is contended that, although that part of the bill failed, the court should still have awarded the plaintiff compensation under the prayer of general relief."

"Judge Story says, 'The usual course is for the plaintiff, in this part of the bill, to make a special prayer for the particular relief to which he thinks himself entitled, and then to conclude with a prayer

for general relief, at the discretion of the court. The latter can never be properly and safely omitted; because, if the plaintiff should mistake the relief to which he is entitled, in his special prayer, the court may yet afford him the relief to which he has a right, under the prayer of general relief." Sto., Eq. Pl., sec. 40.

"It is a well established rule, that where a court of equity once acquires jurisdiction of a cause, it will retain it to do full and complete justice. It will sometimes give damages, which are generally only recoverable at law, in lieu of equitable relief, where it has obtained jurisdiction on other grounds. *Wisswall v. McGowan*, 2 Barb. S. C. 270."

In the case of *Omaha Horse R. R. Co. v. Cable Tramway Co. of Omaha* (Nebr.), 32 Fed. 727, Mr. Justice Brewer, while Circuit Judge, announced the same rule in the following language:

"In a suit for injunction where the prayer of the bill is not only for an injunction, but for other and further relief, the prayer is broad enough, a case being made out, to include assessment of damages."

\* \* \*

And further on in the opinion the courts says:

"Again inasmuch as the prayer for relief contains also the general prayer for other and further relief, it is familiar law that the court may award such further relief as is justified by the facts stated in the pleadings and may fairly have been considered within the contemplation of the parties in the litigation."

In the case of *Lewis and others v. Town of North Kingston and others* (R. I.), 11 Atl. 173, the Supreme Court of Rhode Island passed upon the identical question involved

in this case. The facts are stated in the syllabus of the opinion as follows:

“A bill in equity was brought for an injunction to restrain the town surveyor from removing a building and obliterating the boundaries of the complainant's lot. The answer admitted the removal, but claimed that the land where the building stood was a part of the public highway. A supplemental answer said, ‘the complainants ought not to maintain their bill, because the respondents had fully carried out their objects by removing the building and grading the lot.’ General replications were filed to both answers. Upon respondents’ motion to dismiss the bill, on the ground that the bill does not state a case for equitable relief, and, if it does, the case stated has ceased to exist. *Held*, the motion must be denied. The case falls within the class of cases in which threatened trespasses are enjoined. The statements of the supplemental answer are not reasons for granting the motion, those statements being denied by the replication. *Even if admitted they do not make a case for dismissal, for a defendant, in an injunction suit cannot oust the court of its jurisdiction by committing, pendente lite, the very acts to prevent which the suit was begun.*”

And in the body of the opinion Mr. Chief Justice Duffee uses the following language: “We do not think the motion should be granted because of the statements of the supplemental answer, since those statements are controverted by the replication. Moreover, if they were admitted, we do not think they would make a case for dismissal. It ought not to be in the power of the defendant in an injunction bill to oust the court of its jurisdiction by committing *pendente lite* the very acts to prevent which the suit was begun, and such we think is the law. ‘It is well set-

tled,' says the Supreme Court of Massachusetts, 'with little or no conflict of authority, that when a defendant in a bill in equity disenable himself pending the suit to comply with the order for specific relief, the court will proceed to afford relief by way of compelling compensation to be made and for this purpose will retain the bill and determine the amount of such compensation, although its nature and measure are precisely the same as the party would otherwise recover as damages in an action at law.' " Citing *Milkman v. Orday*, 106 Mass. 232, and S. Story Eq. J. (12th Ed.), Secs. 794-799.

The Supreme Court of Vermont in the case of *Whippel et ux. v. Village of Fairhaven* (Vt.), 21 Atl. 533, considered this same question in a suit for injunction and it held that the injunction should have been granted, and then said:

"Chancery has jurisdiction to grant an injunction in such case and having obtained jurisdiction for that purpose it can award damages."

The Supreme Court of Wisconsin in the case of *Cole et al. v. Getzinger et al.*, 71 N. W. 75, used the following language:

"A landowner had five children. He was very old and feeble, and had lived for many years with a married daughter. Without the knowledge of the other children, the daughter, acting in concert with her husband and R., who had agreed to procure a deed of the land for G. for \$4200, procured a deed for \$3000 through undue influence, the daughter and her husband getting the proceeds. The conveyance was made to a member of R.'s family, and she conveyed the land

to G., who paid the \$4200 as agreed. The father died soon afterwards, and two of his heirs sued to set aside the deed to G. as fraudulent, and joined R., the intermediate grantee, and the other heirs as defendants. It was proved that G. was a *bona fide* purchaser, and the intermediate grantee merely a nominal party to the transaction. *Held*, that, though the deed could not be set aside, as prayed, the cause would be retained and plaintiff's heirs, and the innocent defendant heirs, should each be allowed to recover one-fifth of the value of the land from those defendants who practiced the fraud on the original grantor."

The Supreme Court of Wisconsin again in the case of *Biglow v. Town of Washburn et al.*, 74 N. W. 362, said:

"When, pending a suit to restrain the collection of a tax, the tax office levies on the property and the owner to prevent sale pays the tax, the court may retain jurisdiction and grant such relief as the tax payer may be entitled to."

In the case of *Jas. B. Case v. Wm. Minot et al.*, 158 Mass. 577, 22 L. R. A. 536, it is said:

"The only remaining question is whether relief should be granted against the defendants by way of damages. It was held in *Milkman vs. Ordway*, 106 Mass. 232, that where a plaintiff in good faith brings a suit seeking equitable relief, supposing and having reason to suppose himself entitled to such equitable relief, even though at the time when the bill was brought he had no right to relief purely equitable, yet the court will afford relief by awarding compensation; *a fortiori*, if the reason for denying the purely equitable relief occurs pending the suit. In the present case, provided in other respects, the plaintiffs make out their case, the only reason in not granting the injunction is that pending the suit the plaintiffs' lease has expired. The plaintiffs should not for this reason

be turned out of court, but the bill should be retained for the assessment of damages. Citing *Woodbury vs. Marble Head Water Co.*, 145 Mass. 509; *Brande vs. Grace*, 154 Mass. 210."

The Supreme Court of Virginia in the case of *Grubb v. Sharkey et al.*, S. E. 784, was an action for the specific performance of a contract, and pending the hearing and before final judgment, the defendants made it impossible to perform. *Held*, that the plaintiff was entitled to damages, using the following language:

"A bill was filed to compel defendants to specifically perform a contract, and asking for damages occasioned by a delay to carry out their agreement. Subsequently they completed their contract, and the court directed its commissioner to ascertain the amount of the damages. *Held*, that, equity having acquired jurisdiction it could proceed to a complete adjudication, even to the extent of establishing legal rights."

The Supreme Court of Pennsylvania in the case of *Masson and Besanson's Appeal*, 70 Penn. 27, said:

"Parties agreed to erect a party-wall, each to build a portion specified; one refused, and the other erected the whole wall; the one then commenced to use the party-wall for his building; the other brought a bill to restrain him; pending the dispute, they agreed that the defendant might go on with his building, giving bonds for such sum as might be adjudged to the plaintiff, and the injunction was therefore withheld. *Held*, that as the specific relief asked, therefore, could not be granted, the court, both inherently and by virtue of the agreement, had power to ascertain and award compensation."

In the case of *Kirk v. DuBois*, 28 Fed. 460, involving a patent right, the court says:



"The court has power to decree and account the profits and damages for a previous infringement of the patent when the right to grant an injunction against the infringement has been lost."

And again in the case of *Hohorst v. Howard*, 37 Fed. 97, the following language is used:

"The jurisdiction of an equity court is not entirely ousted by the happening of an event subsequent to the commencement of an action which precludes the exercise of the power to grant an injunction."

In *Encyclopedia of Law & Procedure*, Vol. 22, page 970, under the heading "Damages Where Injunction Improper," the court, after stating the rule in these circumstances, then uses the following language:

"But where, at the time of bringing his bill, complainant was entitled to equitable relief, defendant cannot deprive equity of its jurisdiction over the case by hastening the injurious acts to completion before the hearing. In such case equity may give damages."

Citing in support thereof the following cases: *Langmaid v. Reed*, 159 Mass. 409, 34 N. E. 593; *Smith v. Ingersoll Sergeant Rock Drill Co.*, 7 Misc. (N. Y.) 374, 27 N. Y. Suppl. 907; *Lewis v. North Kingstown*, 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 724; *Fritz v. Hobson*, 14 Ch. D. 542, 49 L. J. Ch. 321, 42 L. T. Rep. N. S. 225, 28 Wkly. Rep. 459; *Davenport v. Rylands*, L. R. 1 Eq. 302, 12 Jur. N. S. 71, 35 L. J. Ch. 204, 14 L. T. Rep. N. S. 53, 1 New Rep. 172, 14 Wkly. Rep. 248.

And in Vol. 16, *Ency. Law & Pro.*, page 113, under the subject, "Where Equity Fails After Suit Brought," the author says:

"The rule is almost absolute that the jurisdiction of equity is to be determined by the facts existing when the suit is commenced. If plaintiff is then entitled to the aid of equity the jurisdiction will not be defeated by subsequent events which render equitable relief unnecessary or improper."

In *American & English Ency. of Law*, Second Ed., Vol. 11, page 201, under the subject "Retaining Jurisdiction After Denial of Relief in Equity," we find the following rule:

"A more substantial exception than the foregoing to the doctrine that equity will not take jurisdiction where the legal remedy is adequate is found in the rule that if jurisdiction has once been assumed, equity will often retain it throughout the litigation, though the relief originally sought is denied and that finally granted is not equitable in its nature. This rule has been applied in applications for injunctions, suits for specific performance and in foreclosure proceedings."

If the court found that the defendants had made it impossible to grant the equity relief prayed, and the complainant suffered damages by way of loss of profits under his contract and otherwise, it had jurisdiction. In our opinion it was its duty to retain the case, to hear evidence, and to assess the damages to which the complainant was entitled.

**Evidence Establishing Damages Sustained.**

**SIXTH PROPOSITION:** *The evidence clearly established that the damage sustained by Mr. McCormick was \$100,000; that the profits which he would have received if he had been permitted to carry out the contracts would have been that sum; that the difference between the contract price—that is, the amount of his bid and the cost of making the improvements, was \$100,000.*

On the trial of the case the evidence showed that the profits of David McCormick in carrying out these contracts involved in this case would have been \$100,000.00. This fact is shown by the affidavit of Foxhall McCormick, who testified that he had been in the paving business constantly for twenty years and had been in the asphalt business for fifteen years; that during a large part of that time he had been in the active management and control of paving contracts and had done the calculating necessary in determining bids to be made and had also been in control of the contracts that were let for work of this nature, and had also been familiar with the costs necessary to perform work of this kind. That during the time he had been in the paving business he had done general contracting with asphalt and other paving materials in Chicago, St. Louis, Kansas City, Topeka, Oklahoma City, Muskogee, San Antonio, Beaumont and Fort Worth; that he had figured the cost of all the work represented by the bids made by David McCormick in the above case for the paving of the streets

and doing of the work in the City of Oklahoma City as represented and shown by the bids, the advertisements for the work, and the improvement and of the estimate of the cost of doing such work, the cost of material, and the total cost of completing the work and also figured the difference between the cost of the work and the amount of the bid, and that after paying the total expenses of the work referred to by the several bids involved in this case, that there would be a difference between the cost of completing the work pursuant to the plans and specifications and the amount of the bid of at least \$100,000.00, and that the profits of the contracts of David McCormick would have been \$100,000.00. This evidence was in the form of an affidavit filed by the appellant and considered by the court on the final trial in conformity with the stipulation between the appellant and the appellees. This evidence showing that the profits of David McCormick under these contracts would have been \$100,000.00 is not denied or disputed by any of the appellees.

**No Notice to McCormick Necessary.**

SEVENTH PROPOSITION: *There was no provision of law for the giving of notice of the award of the contract to contractors, and as shown by the evidence, it was the universal custom not to give such notice.*

As has been shown by the evidence in this case by the witnesses who testified on behalf of the respective parties,

it was never the practice or custom of the City to notify the contractors that a contract had been awarded to them for public improvements of any kind or character. It was the universal rule for contractors to be present when the contracts were awarded, either in person or by their representatives, or to learn the fact that they had been awarded the contract from the City Clerk. Nor do we believe there is any law or statute authorizing or directing any such notice. Those who bid for public improvements already have knowledge of the pendency of the matter; they file their bids and when the bid is accepted and the award made, a public record is made of that in the council journal of the city; and the making of these awards and the spreading of these acceptances and the awards on the minutes of the journal of the City constitute a valid and binding contract wholly in writing as shown by the decisions of the court heretofore cited.

We have just said that there is no statute requiring notice to be given to a successful bidder after the award. We wish, however, to direct the Court's attention to Section 725 of the Statute of Oklahoma, which is quoted in the first part of this brief, which specifically provides how the bidder shall obtain knowledge of whether or not he has been successful. After providing for the resolution of the council, in the latter part of this section (725) it is provided:

"Said resolution shall also direct the City Clerk to advertise for sealed proposals for furnishing the materials and performing the work necessary in making such improvements. The notice for such proposals shall state the street, streets or other public places to be improved, the kind of improvements proposed; what, if any, bond or bonds will be required to be executed by the contractor as aforesaid; and shall state the time when and the place where such sealed proposals shall be filed, and when and where the same will be considered by the mayor and council."

It will be observed that this notice to be published by the City Clerk inviting bids shall "*state the time when and the place where such sealed proposals shall be filed.*"

This notifies the bidders of the place where and the time within when the bids shall be filed; but the statute does not stop there—it immediately follows with the language: "*And when and where the same will be considered by the Mayor and Council.*" That is—the notice shall also state the time when and the place where the same (that is, the bids) will be considered by the Mayor and Council. The purpose of this notice in advising the bidders of the time and place when and where the bids will be considered is so that they may be present and learn as to whether or not the contracts are awarded to them. Pursuant to this notice, McCormick was personally present in the council chamber, as shown by the evidence, at the time these contracts were awarded to him. After providing as hereinbefore set out, the statute also states that:

“Said notice shall be published in ten (10) consecutive issues of a daily newspaper, or two (2) consecutive issues of a weekly newspaper, published and of general circulation in said city.”

And then this same section of the Statute concludes with this provision:

“At the time and place specified in such notice, the Mayor and Council shall examine all bids received, and without unnecessary delay award the contract to the lowest and best bidder, who will perform the work and furnish the materials which may be selected, and perform all the conditions imposed by the mayor and council as prescribed in such resolution and notice for proposals, which contract shall in no case exceed the estimate of costs submitted by the engineer, with the plans and specifications, etc.”

Here the latter part of this section compels the Mayor and City Council to award the contract without unnecessary delay to the lowest and best bidder, not as prescribed in the formal written contract, but as prescribed in such resolution and notice for proposals, which contract (referring to the resolution and notice) shall in no case exceed the estimate of costs submitted by the engineer with the plans and specifications. This statute as to notice was fully complied with. No other notice is required by law, and when the award was made to David McCormick and the resolution accepting the bid spread upon the records of the City Council, the contracts became completed and the City could not recede therefrom without the consent of David McCormick.

**The Court Still Has Power to Grant Equitable Relief.**

**EIGHTH PROPOSITION:** *Under the record in this case the court still has power to grant equitable relief which falls within the facts pleaded and the prayer of the bill by decreeing that David McCormick be paid the amount of damages sustained from the proceeds of the bonds issued on the property abutting the streets improved; but if this cannot be done, then we insist that the court should retain the bill, determine the amount of damages sustained and render judgment therefor.*

The court will see from an examination of the testimony of Mr. McCarthy, the representative of The Conway Company, that he was present in the City Council chambers when these contracts were originally awarded to David McCormick. He was also personally present at the time Mr. Burwell presented the contracts to the Mayor and City Council and demanded their execution and informed the Mayor and City Council that Mr. McCormick would insist upon his legal rights under the same. It also appears from the testimony of Mr. McCormick that he employed special counsel to confer with the city attorney and advise with the Mayor and City Council to the end that he might derive a benefit by securing the contracts for the paving of these streets if the City Council should reconsider the awards made to David McCormick, and his attorney urged the reconsideration of the same.



At each and all of these times Mr. McCarthy was the representative of The Conway Company, in fact, he was during all of that time the secretary of The Conway Company. See page 110 of the record. He was asked the question, "What position, if any, do you hold with the R. F. Conway Company?" and he answered, "Secretary."

The Conway Company are parties to this action, the same as the City and its officers, and The Conway Company prior to the time that the pretended awards for these improvements were let to it, knew of the rights and claims of David McCormick under the awards made to him, and after the awards were made to The Conway Company David McCormick brought this suit, looking toward the protection of his rights under the awards. This action has been pending ever since, and all of the defendants, The Conway Company and all persons interested in these improvements or the bonds issued in payment thereof, either had actual or constructive knowledge of the rights and claims of David McCormick. It will be observed from the statute already quoted in this brief that these improvements are paid for by improvement bonds which are made a lien on the abutting property, the amount to be fixed as a lien upon the particular tracts respectively is determined by persons duly appointed for that purpose.

It will be observed from Sec. 726 of Snyder's Compiled Laws of 1909, that after the benefits of such improvements are appraised that the "Mayor and Council at such session shall have the power to review and correct said ap-

praisement and apportionment and to raise or lower the same as to any lots or tracts of land as they shall deem just and shall by resolution confirm the same as so reviewed and corrected by them. Assessments in conformity to said appraisement and apportionment and as corrected and confirmed by the council, shall be payable in ten equal installments and shall bear interest at the rate of seven per cent per annum until paid, payable in each at such time as the several installments of the assessments are made payable each year. The Mayor and Council shall by ordinance levy assessments in accordance with said im-  
praisement or apportionment as so confirmed against the several lots and tracts of land liable therefor.

“The first installment of said assessment, together with interest to that date upon the whole, shall be due and payable on the first day of September next succeeding the passag of said ordinance, and one installment with the yearly interest upon the amount remaining unpaid shall be payable on the first day of September in each succeeding year until all shall be paid. *Provided, however,* that in case said assessment and interest is not paid when due, the assessment so matured and unpaid shall bear interest at the rate of eighteen per cent per annum until paid. *Pro-  
vided further,* that if such assessing ordinance shall be passed after the first of August, in any year, the first in-  
stallment of such assessment and interest shall be due and payable on September 1st of the following year. \* \* \*

“Such special assessments and each installment thereof, and the interest thereon are hereby declared to be a lien against the lots and tracts of land so assessed, from the dates of the ordinances levying the same co-equal with the lien of other taxes, and prior and superior to all other liens against such lots or tracts, and such lien shall continue until such assessments and interest thereon shall be fully paid, but unmatured installments shall not be deemed to be within the terms of any general covenant or warranty.

“The Mayor and Council, after the expiration of said thirty days, shall by resolution provide for the issuance of bonds in the aggregate amount of such assessments remaining unpaid, bearing date fifteen days after the passage of the ordinance levying the assessments and of such denominations as the Mayor and Council shall determine, which bond or bonds shall in no event become a liability of the city issuing the same.”

Then the statute provides how the bonds shall be issued, the rate of interest, etc., and that they shall not be sold at less than par value. These bonds were not issued until after the commencement of this suit. Therefore anyone purchasing these bonds took them with full knowledge of the equities of McCormick as to the profits of these contracts, and we believe that the Court has the power in the light of these circumstances to hear evidence and determine the amount of the damages which McCormick has sus-

tained by reason of the breach of the contracts by the City and other appellees involved herein, and that it also has the power to direct that these damages which McCormick has sustained, which would be simply his profits under the contracts, be decreed to be a lien upon the various lots abutting the streets to be improved under his contracts and that the amount of these profits or damages of McCormick should by order of the Court be deducted from the bonds already issued, or in other words that the Court has power to direct that that portion of the respective bonds against the lots abutting said streets to be improved, which would represent the profits of McCormick under his contract, may be taken from the present bond holders and applied to the payment and satisfaction of the damages sustained by McCormick, or the Court has the power and we believe it was the duty of the Court further to enter such a decree and judgment or to hear evidence, determine the amount of damages, sustained by McCormick, and to render a judgment against the City of Oklahoma City and The Conway Company for the damages McCormick sustained. The judgment should be against the City because it breached its contract and it should also be against The Conway Company because it connived and encouraged the City in breaching its contract, advised it to do so through its attorney; and it also reaped the fruits and benefits of the improvements which would have gone to McCormick had his contract not been broken.

We believe the positions taken by the appellant in this case on these various propositions are correct; that the City of Oklahoma City had no power or authority to set aside these awards and to subsequently award them to The Conway Company; that these awards constituted valid and binding contracts and that the action of the City in its attempt to vacate the awards was an impairing of the obligation of contracts, and a violation of appellant's rights under the Constitution of the United States.

McCormick acted in good faith throughout the entire transaction. He stood ready, able and willing to carry out and perform his contracts, and the City ought to be compelled to do so on its part or to pay the damages which Mr. McCormick sustained by reason of the loss of profits, and we believe the judgment of the court below should be reversed and the case remanded, to the end that justice may be done.

In addition to what we have said under this heading, we also wish to call the court's attention to the fact that The Conway Company is bound by any judgment which may be rendered in this case.

**The Conway Company Bound by Any Judgment  
Rendered.**

After the bill had been filed in the United States Circuit Court for the Western District of Oklahoma in the above entitled case, The Conway Company filed a peti-

tion or application to be made a party to the suit. This application will be found on pages 66 and 67 of the printed record and is as follows:

“Petition of R. F. Conway Company to Be Made  
Party Defendant.

“Comes now R. F. Conway Co., a corporation doing business under the laws of the State of Oklahoma, and respectfully petitions and prays that it may be permitted to intervene as a party defendant in the above entitled cause, and for cause hereof alleges and says:

“That,..... has a material and substantial interest in the result of said action; that it is now engaged in the construction of the paving embraced in the several streets and avenues stated in complainant's bill, under contract, lawfully executed with the City of Oklahoma City; that upon the completion and acceptance of said work of construction, said petitioner becomes the owner of the street improvement bonds, as payment for such work and which said bonds are the only evidences of payment authorized by law; that this action is to enjoin and prevent the said City of Oklahoma City from paying for said work in the manner herein set out; that the entire amount involved exceeds the sum of \$400,000.

“G. A. Paul,

“Attorney for Petitioner.

“Filed in the Circuit Court on Feb. 24, 1909.”

On the hearing for injunction, Mr. G. A. Paul, one of the attorneys defending the case (see page 134 of printed record), testified as follows:

By Mr. Burwell:

“Q. State your name.

A. G. A. Paul.

Q. You are one of the attorneys who is assisting in conducting the defense in this case?

A. I am.

Q. You are acquainted with the Conway Paving Company?

A. Yes, sir.

Q. Which has been referred to in the testimony of this case?

A. Yes, sir.

Q. Are you employed by the Conway Company as their attorney in matters generally?

Mr. Chambers: Objected to as incompetent, irrelevant and immaterial.

The Court: I will permit the testimony. Ruling reserved.

A. I have an employment by the Conway Company whereby I look after their matters pertaining to the contracts awarded and papers and proceedings of the council, abstracts and proceedings, so forth, yes, sir; but I would not consider it a general employment for all purposes.

Q. You are paid a stipulated salary per month for looking after their business?

A. Yes, sir, that kind of business; yes, sir.

Q. When this suit action was first filed in the Circuit Court of the United States, you learned of it, you went to Guthrie in the interest of the Conway Company and appeared before Judge Cotteral at that place?

A. Well, I will tell you the way that really came about. As soon as the restraining order was served, Mr. Burke handed me a copy of it because he was unable to see Mr. Taylor, the City Attorney. As soon as Mr. Taylor came down, he and I went over the matter together. We

supposed, of course, it was city business in this matter and indirectly the Conway Company were affected by it and my object in going to Guthrie to procure a modification of the restraining order was more for the benefit of the city than it was for the Conway Company.

Q. It was for them also?

A. Mr. Taylor and I went over to your office, tried to get you to consent to the modification of it in behalf of the city and we could not agree on anything; then I suggested to you we would apply to the court for modification; the application for modification was filed in the city's name, but I presented it.

Q. As attorney for Conway Company?

A. Well, I am their attorney as I suggested and in the manner I suggested.

Q. As attorney for the Conway Company you are looking after their interest in the trial of this case, taking such steps as you deem necessary for their interest?

A. I say in this proceeding I am assisting the city attorney.

Q. Answer my question. (Question repeated.)

A. As stated I am assisting the city attorney in handling this matter, together with Mr. Chambers and Mr. Taylor.

Q. After you received information that this restraining order had been issued by the United States Circuit Judge you communicated that fact to the Conway people?

A. Most certainly I did. I will tell you why, though.

Q. You communicated first with them in reference to it?

A. The first communication I received was from the city engineer.



Q. I didn't ask you that.

A. I said I communicated it, I would like to explain it, though.

Mr. Burwell: We object to counsel making a statement which is not pertinent to the question asked.

Q. Mr. Paul, has the city council of Oklahoma City regularly employed you to appear in this case?

A. It has not.

Q. You have no employment from the city?

A. I have no such employment; no, sir.

Q. Then the only employment which you have which permits you to appear here is the employment which you have from the Conway Company?

A. And the understanding with the city attorney, yes, sir.

Q. You also filed the motion or application in this case on behalf of the Conway people to be made parties to this action?

A. I did the day we were up in Guthrie, a week ago today I think it was, but we have abandoned that, asked to withdraw it.

Q. When you filed that application you were acting on behalf of the Conway Company?

A. I certainly was.

Mr. Burwell: I would like to have that application considered in evidence."

*Cross examination by Mr. Chambers*

"Q. You are in this proceeding here by request of the city attorney?

A. Yes, sir.

Q. You started to make an explanation with reference to a certain question asked by Judge Burwell; go ahead and make it now.

- A. My recollection is Judge Burwell asked me whether I did or did not take steps for the Conway Company immediately upon notice of the restraining order being issued by the court and I stated that I did and desired to explain; that explanation is this, that as I understood the marshal got down here with the restraining order, and meeting Mr. Burke, as city engineer, he was served with notice of the restraining order; before I got down to my office Saturday morning, that is, last Saturday morning a week ago, Mr. Burke notified me that the court had restrained the construction work and for me to get in communication with the Conway Company at once so that they would take their men off of the work. I told him to wait until I got down to the office. I got down to the office, he handed me his copy of the restraining order and I got in connection with Mr. Bell, the superintendent of The Conway Company, and told him that there was a restraining order issued out of the United States Court, to wait until we saw what the effect of it was; then I took the matter up immediately with Mr. Taylor; together we went over to Judge Burwell's office; tried to get an agreement of some sort to permit this work to go on before we knew that bond had not been given the restraining order was not effective; that is all we done for The Conway Company.

*Re-direct examination by Mr. Burwell.*

- “Q. After you came over to Mr. Burwell's office you were advised by him that no bond had been given and the order was not in effect?
- A. I don't remember whether you told that to Mr. Taylor and me, there or not.
- Q. To refresh your memory, didn't you read me a portion of the order which says it should be in force even though no bond should be given?

- A. Yes, sir, I remember that. There was some question as to whether or not you contemplated giving that bond immediately. You stated you were going to give the bond immediately. When I went to see Judge Cotteral in Guthrie, he told me what you said in that respect. That is how we were affected because the Conway Company was busy with this work and necessarily would have to cease work in the event you gave bond."

Mr. Tom Chambers, of the firm of Flynn, Ames & Chambers, who also assisted in the defense of this case on the trial for injunction, testified as follows:

"Tom Chambers, being first duly sworn, testified on behalf of the complainant as follows:

Mr. Burwell: You are a member of the firm of Flynn, Ames & Chambers?

A. Yes, sir.

Q. As a member of that firm you are appearing in this case and defending this action?

A. Yes, sir.

Q. The firm of which you are a member were attorneys for the Conway Paving Company in the case that was filed in the District Court of Oklahoma County?

A. You mean in the other case?

Q. Yes, sir; in the other case.

A. Possibly so, but I would not want to swear to it positively; because I don't believe I understood it that way.

Q. Has there been any action of the city council or of its officers employing your firm to represent the city in this litigation?

A. Not to my knowledge.

Q. Isn't it your understanding that your firm are incidentally looking after the interests of the Conway Company in this litigation?

A. Our employment is by the firm of Farmer & Root; our employment in the other case was by the firm of Farmer & Root; we never had anything to do with the Conway Company in this case or in the other case.

Q. Who are Farmer & Root?

A. They are some men here in business.

Q. Who are engaged in the business or occupation of securing contracts for paving or improvements for the Conway Company?

A. I don't know whether they are for the Conway Company especially or not, but I don't think that is their business.

Q. Were any of these eighteen contracts secured through your efforts?

A. You will have to ask them that; I don't know.

Q. Has your firm received any payment from anyone for services in this case?

A. No, sir. Let me tell you the contract was entered into between Mr. Farmer and Mr. Ames, or Mr. Root and Mr. Ames. I don't know, I wasn't present at the time and don't know the nature of it.

Q. You know that as a matter of general information in the office?

A. Yes, sir."

Mr. R. T. Farmer, the agent of the Conway Company, also testified as follows:

"By Mr. Burwell: What is your name?

A. R. T. Farmer.

Q. You are a member of the firm of Farmer & Root?

A. Yes, sir.

Q. What is your business?

A. Why, we represent the M. A. Earl & Co. consulting engineers; the Indiana Shovel Company, Indiana Bridge Company of Indianapolis, and other concerns.

Q. Are they in any way interested in the outcome of this litigation? Can they be affected in any way by any judgment that might be rendered in this case?

A. No, sir.

Q. Are they in any way interested in the Conway Company as far as you know?

A. Not to my knowledge.

Q. Are you in any way or your firm in any way interested in these paving contracts involved in this case?

A. I am personally, but Mr. Root is not.

Q. In what way are you interested?

A. As agent for the company.

Q. For the Conway Company?

A. Yes, sir.

Q. As such agent you employed the firm of Flynn, Ames & Chambers to appear and defend this case?

A. I did not retain the firm as I remember it.

Q. You had employed them to look after the interests of the Conway Company pertaining to this paving matter?

A. We did in the other case, to represent the Conway Company.

Q. If they received any employment from you or your firm pertaining to these matters, that em-

ployment was in the interest of the Conway Company?

A. It was to assist the city.

Q. For the benefit of the Conway Company?

A. Indirectly, yes, sir."

It will be seen from this testimony that Mr. Paul and Mr. Chambers were employed attorneys of the Conway Company. The Conway Company when the matter of rescinding the awards to McCormick came up, employed an attorney, to go before the City Council and make a speech before the Council, urging its authority to rescind the awards made to McCormick. The manager for the Conway Company was present at that same meeting. When the trial came on for the injunction, as has been seen by the testimony above quoted, Mr. Chambers and Mr. Paul appeared as the paid attorneys for the Conway Company and defended the action in the name of the city. The Conway Company had every advantage which it could possibly have had if it had by order of court been named on the record. Mr. Paul and Mr. Chambers, as the record will disclose, conducted the defense of the case upon the trial. They cross examined the witnesses offered by the appellant; they examined the witnesses offered by the appellees; they argued the case when the evidence was closed. They were the attorneys employed by the Conway Company and the Conway Company is bound by any order or judgment which has been or which may hereafter be rendered in the course of this action.

Therefore, as we suggested in our original brief, the Conway Company being in effect a party to this suit, being privy to it, participating in the defense, the court has the power to render any rightful judgment herein, although it may affect the interests of the Conway Company. And equity has the power under these circumstances to render a judgment which will give to McCormick the profits of his contract and to deduct the amount from the assessments levied against the respective property holders for the improvements. This could have been done if the Conway Company had become a party on the face of the record by filing an answer. Having filed a formal application to be made a party and having come in and defended the action with its own attorneys, with its own witnesses, its manager, and its agents, we insist that the court has the power to render a judgment which may affect its interests, because it is in fact, in equity and in law, bound by the judgment.

And in support of this position we desire to cite some authorities, calling the attention of the court to the fact that the Mayor and City Council in awarding these contracts were acting as the representatives and on behalf of the property owners; they being the medium through which the contracts by virtue of law had to be let, but the property owners themselves are the parties who must pay for the paving, the city in no event being financially liable for the same except on account of its own wrongful acts; and therefore the suggestion in the appellees' brief

that injunction will never lie to enjoin the breach of a contract of a municipality, has no application in this case because the city in these instances merely acts as the representative of the property holders for the purpose of letting the contracts for the improvements.

In the case of *Malloy v. Duden*, from the United States Circuit Court of Appeals for the Second Circuit, 86 Fed. 402, Judge Wallace lays down the rule in the following language:

"To give full effect to the principle by which parties are held bound by a judgment, and are not permitted to re-examine the controversy decided by it, not only those who are nominal or formal parties are considered, but so are all others who are identified in interest with either of the immediate parties, and who actually participate in conducting the controversy. The real principal who is behind the formal party and is actually represented by him throughout the controversy, is the real party; and in order to invoke a judgment as an estoppel, for or against him, it is always competent to show what the real situation was, and what part in promoting or defending the suit was actually taken by him. 1 Greenl. Ev., Sec. 523; *Lovejoy v. Murray*, 3 Wall. 1; *Robbins v. Chicago City*, 4 Wall. 657. It is upon this principle that it has often been held that the owner of a patent can invoke a former adjudication of its validity as an estoppel in a subsequent suit against an infringing defendant, although the defendant was not a party of record in the former suit. *Miller v. Tobacco Co.*, 7 Fed.



91; *Manufacturing Co. v. Miller*, 41 Fed. 357; *David Bradley Mfg. Co. v. Eagle Manufacturing Company*, 6 C. C. A. 661, 57 Fed. 985."

In *Ency. of Evidence*, Vol. 7, page 821, under the heading, "Persons Not Parties to But Participants in an Action," the author says:

"A judgment in an action in which a person though not a party thereto participated by conducting a part of its prosecution or defense, in order to advance his own interests or rights, will be treated as an adjudication against such person and may be used against him in a subsequent suit to which he is a party."

And in the foot note to the above citation, on page 822 of the same volume, appears the following:

"If one appears in a suit and conducts a prosecution of the case in his own interest and his conduct is that of a person interested in the result of the action, and is so known to the opposite party, he is bound by the judgment rendered as if he had been a party of record."

Citing the following authorities:

"*Sturdivant Bank v. Hutters*, 87 Mo. App. 534; *Tootle v. Coleman*, 46 C. C. A. 132, 107 Fed. 41; *Hauke v. Cooper*, 48 C. C. A. 144, 108 Fed. 922; *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221; *Roby v. Eggers*, 130 Ind. 415, 29 N. E. 365; *Boyd v. Wallace*, 10 N. D. 78, 84 N. W. 760; *Lane v. Welds*, 39 C. C. A. 528, 99 Fed. 286; *Cheney v. Cross*, 80 Ill. App. 640."

In the case of *Bomar v. Ft. Worth Bldg. Assn.* (Tex.), 49 S. W. 914, the court said:

"A decree foreclosing a vendor's lien and adjudging the title and right of possession to be in the vendor, is conclusive against the assignee of a subsequent mort-

gagee who is not made a party but who employed attorneys to represent his interests.”

In *Cyc. of Law & Procedure*, Vol. 23, page 1249, the author says:

“A person who is not made a defendant of record may still subject himself to be concluded by the result of the litigation if he openly and actively and in respect to some interests of his own, assumes and manages the defense of the action, but to bring about this result it is necessary that the person so intervening should do so for the assertion or protection of some interest or right of his own or to escape some ultimate liability on his own part.”

That was the situation of the Conway Company at the time it, through its attorneys, assisted in the defense of this action. The City Council had attempted to vacate or rescind the awards made to McCormick and had made the pretended awards to the Conway Company, and therefore the interests of the Conway Company were directly involved. It fell squarely within the rule laid down in these authorities.

In the case of *Lorejoy v. Murray*, 3 Wall. 419, 18 Law Ed. 129, the Supreme Court of the United States in passing upon the liability upon an indemnity bond given for a sheriff used the following language:

“We have already shown that the effect of giving the bond was to make defendants principals in the transaction, and that so far as the action of the sheriff after that was a trespass, it was directed by them, and was for their benefit. With a just appreciation of their relations to each other in the transaction, he called on them, when sued, to assume the defense;

and they did so. They were defending their own acts, although the suit was in the sheriff's name. They had full right to make all defense there which they could make here. They could adduce witnesses, and cross examine those of plaintiff, and could have taken an appeal. The case is wanting in none of the elements so happily stated by Mr. Greenleaf, as rendering a former judgment conclusive in a second suit. 'Justice requires,' he says, 'that every cause be once fairly and impartially tried; but the public tranquilly demands that, having been once tried, all litigation of that question and between the same parties should be closed forever. It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he is a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger, he may well be bound. Under the term "parties" in this connection the law includes all who are directly interested in the subject matter, and had a right to make defense or to control the proceedings; and to appeal from the judgment. This right involves also the right to adduce testimony and to cross examine the witnesses adduced on the other side. Persons not having these rights are strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings.' 'The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with him in interest, and wherever this identity is found to exist all are alike concluded.' 1 Greenleaf Ev., Secs. 522, 523. The authorities cited by the learned author fully sustains these propositions."

In the case of *Empire State Nail Co. v. American Solid Leather Button Co. et al.*, 71 Fed. 588, the court says:

"A corporation which assumes the defense of a patent infringement suit, brought against one who pur-

chased the infringing articles from it, is estopped by the judgment to the same extent as if it had been a party."

The United States Circuit Court of Appeals for the Seventh Circuit, in the case of *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 57 Fed. 980, which was also a patent right case, on page 985 of the volume says:

"The suit in the Circuit Court of the United States for the Southern District of Iowa was brought to restrain the infringement of the same claims of the same patent here in question. The defendant there was the agent of the present appellant in the sale of the infringing machines. The defense of the suit there was assumed and prosecuted by the appellant here. The appellant was in fact the real party to that litigation, and, so far as the decree there is *res adjudicata*, is as effectively concluded thereby as if it were the actual defendant to the record. *Lovejoy v. Murray*, 3 Wall. 1, 18, 19; *Robbins v. Chicago*, 4 Wall. 657.

"That the decree was interlocutory at the bringing of this suit, and subsequently ripened into a final decree, does not impair its efficacy or conclusiveness when properly presented in this suit. The relative time of institution of suit, or the relative date of final decree, is not of consequence if the merits of the controversy be thereby fully and finally determined, and the record thereof is properly brought to the attention of the court. *Duffy v. Lytle*, 5 Watts. 120; *Casaheer v. Mowry*, 55 Pa. St. 422; *Child v. Powder Works*, 15 N. H. 547."

In the case of *Bailey et al. v. Sanberg*, 49 Fed. 585, which was a case decided by the Circuit Court of Appeals of the Second Circuit, the opinion being by Judge Wallace, and concurred in by LaCombe, that court said:

"Where, on a libel *in rem* for collision, the master of

the libelee, though not a formal party, takes an active part in the defense, a dismissal on the merits renders the question *res adjudicata* as against a subsequent libel *in personam* against him."

And further on in the body of the opinion the court says:

"Sunberg not only had notice of the suit, but he participated in its defense, and, although it does not appear that he was requested to assume its defense, he would not be permitted to re-examine the fact. *Chicago v. Robbins*, 2 Black 418; *Robbins v. Chicago*, 4 Wall. 657; *Heiser v. Hatch*, 86 N. Y. 615; *Miller vs. Tobacco Co.*, 7 Fed. Rep. 91. He was the agent of the owner of the steamship in the alleged trespass which was the cause of action asserted by the owners of the schooner; and the decree necessarily determined that he, as well as his principal, was innocent of the imputed wrong. Upon principle, all those who have litigated that question ought to be precluded, as against one another, from litigating it again. 'Justice requires that every cause be once fairly and impartially tried; but the public tranquilly demands that, having been once so tried, all litigation of that question, between those parties, should be closed forever.' 1 Greenl. Ev., Sec. 522. The owners of the schooner, having chosen to test their right against the principal, and having had their day in court, ought to be precluded from testing it again on the same issue against the agent. *Emma Silver Mining Co. v. Emma Silver Mining Co.*, 7 Fed. Rep. 401. It was held in *Emery v. Fowler*, 39 Me. 326, in a carefully considered opinion by the Supreme Court, that a party is not permitted to bring an action against a principal for an alleged trespass, and, after failing upon the merits, to subsequently bring one against the servant who acted by the order of the principal, and rely upon the same acts as a trespass. The court said:

"In such cases the technical rule that a judgment can only be admitted between the parties to the record,

or to their privies, expands so as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others.' "

In the case of *Tootle v. Coleman et al.*, 107 Fed. 41, the court considered the question of parties to an action, and in the body of the opinion, which was written by Judge Sanborn, and concurred in by Judges Caldwell and Thayer, the court said:

"When one instigates another to do a wrongful act, and when the wrongdoer is sued, takes upon himself and conducts the defense of the case, is estopped from again litigating with the plaintiff in that action the issues were decided. *Lovejoy v. Murray*, 3 Wall. 1, 18 L. Ed. 129. The judgment against Walker was therefore a conclusive determination against the defendants of the issues whether or not the plaintiffs were the owners of the property seized, and of the value of that property."

In the case of *Frank v. Wedderin*, 68 Fed. 818, which was decided by the Circuit Court of Appeals for the Fifth Circuit, the court uses the following language:

"This brings us to the question whether the defendants in error (plaintiffs in the Circuit Court) are estopped by the judgment provoked by them in the Circuit Court in the cases of the Prentiss Tool & Supply Company, the Niles Tool Works, and the Cleveland Forge & Iron Company, against the Taylor Brothers Iron Works Company, Limited; that is to say, to the question whether the defendants in error made themselves parties in those suits. The record shows that, thinking they had an interest in the subject matter of the suits, they voluntarily appeared and suggested their interest; that they prayed for the dissolution of the attachments and the dismissal of the suits; that they were heard by the court, and in-

produced witnesses on their own behalf, and that, when judgment was rendered adverse to their demands, they abided the decision, whereby it became final. If they are, as they still claim to be, the liquidators of the Taylor Brothers Iron Works Company, Limited, they had an interest in the suits and right to make a defense."

In *Robbins v. Chicago*, 4 Wall. 657, it is said:

"Conclusive effect of judgments, respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination. Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make a defense, control the proceedings, examine and cross examine witnesses, and appeal from the judgment. Persons not having those rights substantially are regarded as strangers to the cause; but all who are directly interested in the suit, and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of those rights, are equally concluded by the proceedings."

In the case of *Australian Knitting Co. v. Gormly*, 138 Fed. 92, District Judge Ray, for the Northern District of New York, considered the question of when parties were bound and cites many authorities. His opinion supports the position urged by the appellant in this brief, and we refer to that case because of the citations therein contained.

In the case of *Chesapeake and Ohio Canal Co. v. County Commissioners of Allegheny County*, 59 Md. 201, 40 Am. Rep. 430, the court, basing its opinion upon the rule laid

down in *Robbins v. Chicago City*, 4 Wall. 657, uses the following language:

"In this view we are supported by the expressions of the Supreme Court in 4 Wall. 672, in passing upon the same legal question. They say: 'Conclusive effect of judgments, respecting the same cause of action and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination. Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make defense, control the proceedings, examine and cross examine witnesses, and appeal from the judgment. Persons not having those rights substantially are regarded as strangers to the cause, but all who are interested in the suit, and have knowledge of its pendency and who refuse or neglect to appear and avail themselves of those rights, are equally concluded by them.' See also 3 Wall. 18, 2 Black 418; 2 Taylor on Ev., Sec. 497; 1 Greenl. on Ev. (12 Fed.), 559."

In the case of *Theller v. Hershey*, 89 Fed. 575, the court used the following language:

"Do the averments in the bill show that the respondent herein was privy to the former action? Are the allegations sufficient to show that respondent would be bound by the judgment in Theller against Ross?"

"The argument on behalf of respondent is (1) that there is no allegation that he had any such control over the former action as to be bound by any judgment rendered therein; (2) that there is no allegation that the judgment in Theller against Ross is a final judgment. It is not necessary for the complainant to allege in direct terms that the respondent had such control over the former action as to be bound by the proceedings had therein, but he is required to state such facts as will enable the court to determine whether, if true, he is



so bound. I am of the opinion that the facts stated in the complaint are sufficient. Ordinarily, it is for the court in the trial of a case to determine who are parties and privies. Parties include not only those whose names appear upon the record, but all others who participate in the litigation by employing counsel, or by contributing towards the expenses thereof, or who, in any manner, have such control thereof as to be entitled to direct the course of proceedings therein. Thus it is said in 3 Rob. Pat. 1176: 'Where several defendants, by agreement, contest one of the actions in their joint behalf, all become thereby parties to the suit, and are equally concluded by the judgment.' The law is well settled that parties and privies include all who are directly interested in the subject-matter, and who had the right to make defense, control the proceedings, examine and cross examine witnesses, and appeal from the judgment.' *United States & Foreign Salamander Felting Co. v. Asbestos Felting Co.*, 4 Fed. 816; *Miller v. Tobacco Co.*, 7 Fed. 91; *Claffin v. Fletcher*, Id. 851; *American Bell Tel. Co. v. National Improved Tel. Co.*, 27 Fed. 663; *Eagle Mfg. Co. v. David Bradley Mfg. Co.*, 50 Fed. 193, Id. 6 C. C. A. 661; 57 Fed. 980, and authorities there cited; *Lovejoy v. Murray*, 3 Wall. 1, 18; *Robbins v. Chicago City*, 4 Wall. 657, *Walk Pat.* (2nd Ed.), 468."

See also case of *Hauke v. Cooper*, 108 Fed. 922, by the Circuit Court of Appeals for the Fifth Circuit, in which the court says:

"Neither the benefit of judgments on the one side, nor the obligations on the other, are limited exclusively to parties and their privies. Or, in other words, there is a numerous and important class of persons, who, being neither parties upon the record nor acquirer of interests from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among these are persons on whose behalf and under whose direction the suit is prosecuted or defended

in the name of some other persons. As is illustrated by the case of trustee and *cestui que trust*, the real party in interest cannot escape the result of a suit conducted by him in the name of another. The fact that an action is prosecuted in the names of nominal parties cannot divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the question and who are estopped by the previous decision. Whenever one has an interest in the prosecution or defense of an action and he, in the advancement or protection of such interest, openly takes substantial control of such prosecution or defense, the judgment, when recovered therein, is conclusive for and against him to the same extent as if he were the nominal as well as the real party to the action."

Greenleaf, in his treatise on the Law of Evidence, Vol. 1, Sec. 523, states the rule applicable to this class of cases, thus:

"Under the term 'parties' in this connection the law includes all who are directly interested in the subject-matter and had a right to make defense or to control the proceedings and to appeal from the judgment. This right involves, also, the right to adduce testimony and to cross examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause. But, to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term 'privity' denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is that they are identified with him in interest; and whenever this identity is found to exist all are alike concluded. Hence all

privies, where in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity.

“The correctness of this statement has often been affirmed by this court (*Lovejoy v. Murray*, 3 Wall. 1, 19, 18 L. Ed. 129; *Robbins v. City of Chicago*, 4 Wall. 657, 18 L. Ed. 427), and the principle has been recognized in many cases. Indeed it is elementary. *Hale v. Finch*, 104 U. S. 261, 26 L. Ed. 732; *Brooklyn City & N. R. Co. v. National Bank of the Republic of New York*, 102 U. S. 14, 26 L. Ed. 61; *Butterfield v. Smith*, 101 U. S. 570, 25 L. Ed. 868; *Litchfield v. Goodnow's Admr.*, 123 U. S. 549, 8 Sup. Ct. 210, 31 L. Ed. 199. In the suit of *Brown Hardware Co. v. Westgaard, et al.*, and particularly on the intervention of the *Provident National Bank*, the validity of *Haulke's* title to the land in controversy was directly in issue, and as there was evidence tending to show that *M. A. Cooper* was directly interested in the subject-matter presented in the intervention, and had by agreement control of the proceedings through counsel employed by himself, and had the right and opportunity to, and did adduce testimony, and had the right to cross examine witnesses adduced on the other side, and as *J. D. Cooper*, the plaintiff below, after said suit was concluded, derived his title from *M. A. Cooper* and was in privity with him in successive relationship to the same rights of property involved in said suit, we are of the opinion that the question of estoppel, by reason of the judgment rendered in the case of *Brown Hardware Company* against *Olaf Westgaard, et al.*, was proper for the jury's consideration and should have been submitted under instructions substantially as requested.”

In the case of *Boyd v. Wallace* (N. D.), 84 N. W. 760, the court used the following language:

“One who is not a party defendant on the record in an action, but who participates in the defense, and has an interest in the matter in controversy in the action, and participates in the defense for the protection of such interest, and not as representing the interest of the defendant of record, and whose it is known to the

plaintiff that such party so participates for the protection of his own interest, is bound by the decree rendered in the action."

\* \* \* \* \*

"This plaintiff procured continuances in that case upon his own application. He resisted the appointment of a receiver upon his own affidavit. He testified as a witness for the defense. In short, he conducted the case in all respects as he would have done had he been named as defendant and the answer showed that he was the only party who had any beneficial rights therein to be defended. These conditions existed: (1) He participated in the defense of that action; (2) he was interested in the very matter in controversy in that action; (3) he participated in such defense for the protection of his own interest, and not as representing any interests of Lucy A. Boynd; (4) it was fully known to the other party to the action that he defended for the protection of his own rights because the answer so disclosed. That he is bound by the decree under such circumstances has been too often decided to require further discussion. See *Stoddard v. Thompson*, 31 Iowa 80; *Valentine v. Mahoney*, 37 Cal. 389; *Harvie v. Turner*, 46 Mo. 444; *Stanford v. Lyon*, N. J. Err. & App., 7 Atl. 869; *Society v. Manchester* (R. I.), 23 Atl. 30; *Cramer v. Mfg. Co.*, 35 C. C. A. 508, 93 Fed. 636; *Brady v. Brady*, 71 Ga. 71; *Association v. Rogers*, 42 Minn. 123, 43 N. W. 792; *Williams v. Cooper* (Cal.), 57 Pac. 577. The decree of the trial court is in all things affirmed. All concur."

To the same effect is *Roby v. Eggers* (Ind.), 29 N. E. 365. In this case the court says:

"One who prosecutes a suit in the name of another to establish a right of his own is as much bound by the result of that suit as he would be if he were a party to the record. *Palmer v. Hays*, 112 Ind. 389, 13 N. E. Rep. 882; *Burns v. Gavin*, 118 Ind. 320, 20 N. E. Rep. 799; *Feem., Judgm., Sec.* 174; *Montgomery v. Vickery*, 110 Ind. 211, 11 N. E. 38; *Stoddard v. Thompson*, 31

Iowa 80; Elliott v. Hayden, 104 Mass. 189; Train v. Gold, 5 Pick. 380. As the appellant in this cause procured the commencement of the suit in the Circuit Court of the United States in the name of Smith and Morgan, filed an abstract of title showing title in them, and prosecuted the suit for them as one of their attorneys, and thus procured a final judgment, involving the identical matters involved in this suit, we think he should not be heard to say now that he is not bound by the result of that litigation. Denetton v. DeMello, 12 East 234; Cromwell v. County of Sac, 94 U. S. 351; Shirley v. Pearne, 69 Amer. Dec. 375; Tarleton v. Johnson, 60 Amer. Dec. 515; Callahan's Lessee v. Dunning, 4 Dall. 120; Shugart v. Miles, 125 Ind. 445, 25 N. E. Rep. 551. In speaking of the rule which prohibits the splitting of a cause of action, a learned author has said: "The principle which prevents the splitting up of causes of action, and forbids double vexation for the same thing, is a rule of justice, and not to be classed among technicalities. It was intended to suppress serious grievances. In point of fact, this rule is not even a product of modern jurisprudence, but was well known in the Roman Systems." 2 Black on Judm., Sec. 734."

We also direct the court's attention to the following cases:

*Robbins v. Chicago City*, 4 Wall. 657; *Lane et al. v. Wells et al.*, 99 Fed. 286, which was by the United States Circuit Court of Appeals for the Sixth Circuit.

*Holt County et al. v. National Life Ins. Co.*, 80 Fed. 686; *Ashlan et al. v. City of Rochester*, 30 N. E. 955; *Daskman v. Ullman*, 43 N. W. 381; *Mo. Pac. R. R. Co. v. Twiss et al.*, 53 N. W. 76; *McIntosh v. City of Pittsburg*, 112

Fed. 705; *American Bell Tel. Co. v. National Improved Tel. Co.*, 27 Fed. 663, and *Davis v. Smith*, 10 Atl. 55.

The court has power to still grant equitable relief to the amount of bonds unpaid, but if it should conclude otherwise, then the city, having made it impossible for equity to grant relief, is liable in damages and the court of equity may hear the evidence and assess the same.

We believe that both the trial court and the Honorable Circuit Court of Appeals have failed to recognize the true principles of law which obtain under the facts of this case. When the City Council awarded the contracts to David McCormick those awards were made a matter of record; this constituted a valid and binding contract, notwithstanding the specifications contemplated that a more formal written contract to be signed by the parties should be executed. This doctrine is fully supported by the authorities we have cited in this brief, and we have found no authorities to the contrary under conditions similar to the case at bar; and we believe that this case should be reversed and the lower court directed to enter judgment in favor of the appellant and against the appellees; that whatever remains unpaid from the lot owners should be applied to the payment of the judgments procured by McCormick against the City, and in the event that said sum should be insufficient to pay the amount of damages sustained by McCormick, then he should have judgment against the City for the same, or the judgment should go against the

City for the whole amount. In any event, the court has the power to render a judgment which will give to David McCormick that to which he is entitled—which is the profits of his contract, of which profits he has been deprived by the wrongful act of the City and the Conway Company.

**Formal Contract Same as Plans, Profiles, Specifications, Resolutions, Notices, Etc.**

NINTH PROPOSITION: *The formal contract used by the city and which was formally executed by McCormick and presented to the city for execution by it, contained no substantial provisions or conditions which were not embodied in the contract already entered into between the city and David McCormick by virtue of the plans, profiles, specifications, resolutions, notices, bids and awards; and hence the formal written contract to be signed by the city and David McCormick would in no way change or modify the contract already evidenced by writings.*

It has been said that the specifications contemplated the executing of a formal written contract. The formal written contract is a printed form prepared by the city, and this formal written contract was executed by McCormick and tendered to the city, with the demand that it also execute the formal written contract on its part, which the city refused to do. Under all of the authorities—if there was nothing new to be inserted in the formal writing to be signed by McCormick, then the contract was complete—and

the formal writing would simply be a re-stating of the matters and things already agreed upon. There has never been any contention on behalf of the city that the formal contract signed by McCormick was not in conformity with the agreement for the doing of the work.

Now, let us compare the terms of the formal written contract executed by McCormick, and which was on the usual printed form of the city, with the terms of the specifications, the resolutions, the notices the bids and awards, and see whether or not there is a single material condition in the formal written contract printed by the city, and the contract already made. We shall take this contract up, clause by clause, and compare it with the general specifications in the other instruments, placing the clause of the formal writing on the left hand of the page, and the clause of the contract already made by the resolutions, the notices, bids and awards on the right, to the end that they may be conveniently compared by the court.

In some instances as a matter of convenience and to save space in the brief we have stated the substance of the clause instead of quoting them literally.



Provisions of formal written contract executed by McCormick, but not signed by the city—the form of which was prepared by the city and printed blanks furnished contractors.

Provisions of resolutions, specifications, notices, bids and awards, showing that all the conditions of the formal written contract were already embodied in one or more of these instruments, and showing that the formal written contract was merely a restatement of the contract already agreed to.

After the formal part of the written contract, it contains the provisions as hereinafter set forth (Page 160 of printed record, third paragraph from beginning of contract):

Contractor covenants to furnish all the material and to perform all the work necessary to complete the improvements, according to the terms of said resolutions, and in conformity to the plans and specifications, to the satisfaction of the City Engineer and the City Council.

In the bid of David McCormick (page 146 of printed record), he agrees to furnish all material for the improvements and to perform all the work in the manner and under the conditions required by the specifications therefor. On page 42 of printed record, in the specifications, it is provided the contractor shall conform to the directions of the City Engineer and the Construction Committee (of the City Council), as to the

order in which the different parts of the work shall be done, as well as to all their other instructions as to the mode of doing the same.

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The contractor is to keep streets in good repair for a period of ten (10) years at his own expense, all as provided in said specifications.

All of the notices provided for a five and ten year maintenance guaranty (see page 146 of printed record); the bid of McCormick was based on a five and ten year guaranty (page 146 of printed record), and the awards of the contracts to McCormick were upon a ten (10) year maintenance guaranty. (See page 79 of printed record.)

It will be observed that on motion of Mr. Byers, all bids for asphalt paving based on a five year guaranty were rejected, leaving only the ten year bids remaining, and the awards were all made to McCormick upon his ten (10) year guaranty bid.

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The contractor agrees to commence work within . . . days from the time the contract was signed. The work to be completed to the satisfaction and acceptance of the City Engineer and the Paving Committee of the City Council, within six months after commencement of work. Working days include all days except only Sundays and legal holidays, and such others

In the general specifications, page 42, 6th paragraph from top of page, it is provided that the first party agrees to commence the work embraced in *this* contract, within . . . . days after signing same; and the first paragraph of the specifications, on page 42 of printed record expressly provides that the first party (the contractor), shall commence work at such points as the City Engineer and Construction Committee may direct, and shall conform to their directions as to the order in which the different parts of the work shall be done, *as well as to all their other instructions as to the mode of doing the same.*

And in the bid of David McCormick, page 147 of printed record, he agrees to commence work within . . . . days after signing the contract, and to complete same within six months after commencement.

The language "and such other (days) as are hereinafter excepted," in no way modifies the contract, as evidenced by the specifications, resolutions, notices, bids and awards. But it has reference to the last paragraph on page 42 of the record, where the specifications refer to "bad weather," etc.

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The next clause of the contract provides that the work therein

contemplated shall be commenced at such point or points and prosecuted in such manner and with such force as the City Engineer of the city may direct, and for each working day beyond the time fixed in this contract for the final completion of the improvements such completion shall be delayed by the contractor, the contractor shall pay to said city the sum of \$25.00 per day to cover continuing expenses of engineer and inspectors.

In the first paragraph of specifications, on page 42 of printed record, it is provided:

"The first party shall commence work at such points as the Engineer and Construction Committee may direct,"

and in the proposal filed by David McCormick (page 146 of the printed record), he agrees to perform the work in the manner and under the conditions required by the specifications therefor, and then the following paragraph, on pages 42 and 43, clearly shows that the contractor is to do the work with such force and in such manner as the City Engineer may direct.

Then on page 42 of printed record, sixth paragraph on that page, it is provided that if the contractor shall fail to complete the work within the time specified, an amount equal to the sum of

\$10.00 per day for each and every day thereafter until the completion of said work, shall be deducted for liquidated damages for such breach of contract.

There is a slight difference here between the amount stated in the specifications and the amount stated in the contract. The contract states \$25.00 per day, while the specifications state \$10, but under the authorities, the amount in the specifications would control, but in any event the city could not take advantage of this as the amount stated in the contract is greater than that stated in the specifications.

The contract then provides that it is made subject to the following stipulations and conditions, numbered from 1 to 12 inclusive, and which we will take up and compare in the order named:

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The party of the first part (the Contractor), shall do all the work embraced in the contract, so as to conform to the directions of the City Engineer, as to the order of time in which the different parts of the work shall be done, as well as to any other instructions as to the mode of doing the same, not inconsistent with the specifications.

The first paragraph on page 42 expressly provides that the first party shall conform to the directions of the City Engineer and

Construction Committee, as to the order in which the different parts of the work shall be done, as well as to all their other instructions as to the mode of doing the work. The formal contract merely adds the words "not inconsistent with the specifications." Of course, this language adds nothing to the contract, is not inconsistent with the specifications, but is an attempt to make the formal written contract consistent therewith.

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The next paragraph provides, that when the contractor is not present on the work, orders will be given by the City Engineer to the superintendents or overseers in immediate charge thereof, and that such orders shall by them be received and obeyed. That if any person employed on the work shall refuse or neglect to obey the instructions of the City Engineer in any way relating to the work, or shall appear to the City Engineer to be incompetent, disorderly or unfaithful, he shall upon the requisition of the City Engineer be at once discharged and not again employed on any part of the work.

The second paragraph on page 42 of printed record, being a part of the specifications, expressly provides that whenever the contractor is not present on the work, orders will be given to the superintend

ent or foreman in immediate charge thereof, and shall by them be received and obeyed, and that if any person employed on the work shall refuse or neglect to obey the orders of the Engineer or Construction Committee, or shall appear to the Engineer to be incompetent, disorderly or unfaithful, he shall upon the requisition of the Engineer or the Construction Committee (of the City Council), be at once discharged and not again employed upon any part of the work.

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The next paragraph of the contract (page 161), provides that any work not therein or in the specifications specified, which may be fairly implied as included in the contract, of which the City Engineer shall be the judge, shall be done by the Contractor without extra charge beyond the contract price.

In the specifications (page 42, 3rd paragraph from top of page), it is expressly provided that any work not "herein specified, which may be fairly implied as included in 'this contract,' of which the Engineer and Construction Committee shall be the judge, shall be done by the first party without charge."

This language is identical, except where the specifications say "shall be done by the first party without charge," the formal writ-

ten contract says shall be done by the contractor without extra charge "beyond the contract price."

We submit that this language means exactly the same.

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The next paragraph of the contract provides that the working days on "this contract" lost in consequence of injunction or court proceedings, or bad weather, or by grading or trenching by other contractors, corporations or individuals over whom the party of the first part has no control, or organized general strikes or the burning of the plant where the materials for "this contract" are prepared, shall not be held to be working days and shall be added to the number of days specified in this contract within which the work shall be completed."

The specifications, in the last paragraph on page 42 of the printed record, provide that the days or work lost on "this contract" in consequence of injunction or court proceedings, by bad weather, or work being done by other contractors, corporations or individuals, over whom the party of the first part has no control, organized strikes or destruction by fire or otherwise of any plant where material for this contract is manufactured, or made, shall be added to the number of days



specified in the contract within which such work was to be completed.

The two paragraphs are identical.

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The next paragraph of the contract (see page 161 of printed record), provides that if, in the opinion of the Engineer, the contractor at any time during the progress of the work is not prosecuting the work with sufficient force to insure its completion within the time specified in "this contract," he may notify the contractor by written notice to employ such additional force as he deems necessary, and on the failure of such contractor to comply with said notice within three days after its delivery, the City Engineer may put on such additional force at the cost of the party of the first part, or he may at his option declare such contract annulled, but such declaration must be confirmed and ratified by vote of the Council before having any force or effect, and the power is reserved to the City Engineer to sustain or annul "this contract," or to suspend the doing of any work thereunder, at any time, for any failure on the part of the contractor to fulfill the same, or for other good causes; and any action of the City Engineer in suspending or annulling "this contract," or

suspending the doing of the work thereunder, and his decision as to existence of the causes or reasons for such annulment or suspension shall be conclusive to the existence of causes or reason in any controversy or litigation between the parties to the contract, or others claiming under them, unless the contractor shall appeal from such order or action of the Engineer to the Council, without delay, and that upon such appeal the Council shall promptly take up and decide the matters in controversy, and the decision of the Council concerning such matters shall be final, unless the contractor shall commence legal proceedings within five days from the decision of the Council, and if the contract be suspended or annulled the party of the first part shall not be entitled to anything on account of damages thereby occasioned, unless it shall appear that such annulment or suspension was without good cause; nor shall such annulment or suspension in anywise affect the right of the City to damages and penalty claimed by it on account of the failure of the contractor, but said abatement or annulment or suspension must be ratified by the City Council before being of any force or effect.

We now call the court's attention to that clause of the specifications beginning at the top of page 43 of the printed record.

While we have stated the substance of the clause of the con-

tract, we here give the verbatim language of the specifications, which the court will observe by a comparison with the paragraph of the written contract is in exactly the same language. It is as follows:

"If in the opinion of the Engineer and Construction Committee the first party, at any time during the progress of the work is not prosecuting said work with sufficient force to insure its completion within the time specified in this contract, they may notify said first party to employ such additional force as they may deem necessary, and upon the failure of said party to comply with such notice within three days from date of such order the Engineer or Construction Committee may put on such additional force at the cost of said party or they may at their option declare the contract annulled, but said declaration must be confirmed and ratified by ordinance before having any force or effect.

"And the power is reserved by the Engineer and Construction Committee of the City of Oklahoma City to suspend or annul this contract or to suspend the doing of any work thereunder, at any time, for any failure on the part of the party of the first part to fulfill the same or for good cause, and any action of the City Engineer and Construction Committee in suspending or annulling

this contract or suspending the doing of any work thereunder, and their decision as to the existence of such cause or reason for such annulment or suspension shall be conclusive as to the existence of such cause or reason in any controversy or litigation between the parties hereto, or others claiming under them. And if this contract cannot be so suspended or annulled, said first party shall not be entitled to anything on account of damages thereby, nor shall such annulment or suspension in any wise affect the right of said Oklahoma City to damages and penalties claimed by it on account of the failure of said first party, but said abatement or suspension or annulment must be ratified by ordinance before having any force or effect."

Attention is now called to the next paragraph of the contract, indicated by the number 6 preceding the paragraph, and which appears on page 162 of the printed record. It is as follows:

"The contractor will be required to observe all city ordinances in relation to obstructing the streets, maintaining the signals, keeping open passaways and protecting the same where exposed, and generally to obey all laws and ordinances controlling

or limiting those engaged on the work; and the contractor hereby expressly agrees to indemnify and hold harmless the City of Oklahoma City from all suits and actions, of every nature and description, brought against the said city, for, or on account of any injuries or damages received or sustained by any party or parties or by or from the acts of the contractor or his servants or agents in the performance of their duties in doing the work herein contracted for, or in consequence of any negligence in grading the same or in any improper materials used in the construction, or by or on account of any acts or omissions of the said party of the first part, its servants or agents."

Comparing the language in the formal contract with the following language appearing in the specifications—3rd paragraph on page 43 of printed record—it will be observed that they are identical. The language is as follows:

"The first part will be required to observe all city ordinances in relation to the obstructing of any street, maintaining signals, keeping open passageway and protecting same where exposed, and generally obeying all laws and ordinances controlling or limiting those engaged on the work, and the said first party binds itself to indemnify and save harmless the City of Oklahoma City from all suits or

actions of every name and description brought against said city, for or on account of any injuries or damages received or sustained by any party or parties, by or from the acts of said contractor or his servants or agents in doing any of the work herein contracted for, or by or in consequence of any negligence in guarding the same or any improper material used in its construction, or by or on account of any act or omission of said first party, his servants or agents."

The next paragraph of the formal contract, which appears on page 162 of the printed record, is as follows:

"The party of the first part further agrees, that it will pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work, and for all material used therein. It is hereby further agreed that the contractor shall pay engineering, printing, appraisers, and all other fees provided for by the ordinance of said city, in cash at the expiration of each and every month."

Now, observe the language in the specifications, 2nd paragraph, page 44 of the printed record, as follows:

"The first party further agrees that he will pay for the work

and labor of all laborers and teamsters, teams and wagons, employed on the work, and all materials used therein."

But the latter part of paragraph 7 of the contract, on the opposite side of this page, also provides that the contractor shall pay engineering, printing, appraisers and all other fees provided for by the ordinance of said city, in cash at the expiration of each and every month. Apparently this part of the clause of the formal contract is not in the specifications, but in the specifications (see page 41 of printed record), under the heading "Special Assessments," it is provided:

"In accordance with Ordinance 328, the City Engineer is authorized to collect a cash fee of 2½% of the total amount estimated on the public improvements to be contracted for by or in the City of Oklahoma City. The contractors are requested to familiarize themselves with the terms embodied in Ordinance 328 and be governed accordingly."

We now direct the court's attention to Ordinance 328 of the City of Oklahoma City, which is as follows, to-wit:

"An Ordinance Authorizing an Assessment to be Added to the Cost of all Contracts for Public Improvements Contracted in or by the City of Oklahoma City,

O. T., and Providing for the Collection and Distribution of same, Said Assessments being Made to Cover the Cost of Engineering and Inspection.

*Be it ordained by the Mayor and Councilmen of the City of Oklahoma City:*

DUTY OF ENGINEER—FEES—IMPROVEMENTS.

Sec. 1. It shall be the duty of the City Engineer to add 2½ per cent to the total amount estimated on all public improvements to be contracted in or by the City of Oklahoma City, and that the same shall be plainly specified in the estimate filed with the city clerk and used by contractors in making their bids.

NOTICE TO CONTRACTORS.

Sec. 2. That all contractors shall be notified by the City Clerk that a bill shall be rendered at the end of each month during the continuation of this contract, by the City Engineer covering the cost of engineering and inspection for that month; provided that the total amount of bills rendered does not exceed 2½ per cent of the total amount of his contract.

BILLS TO BE PAID MONTHLY.

Sec. 3. That bills rendered by the City Engineer at the end of each month shall be paid by the



contractor to him not later than the second day of the following month.

ENGINEER TO COLLECT FEES—REPORT.

Sec. 4. It shall be the duty of the City Engineer to collect such assessments and include the same in his daily reports.

Sec. 5. This ordinance shall take effect and be in force from and after its passage, approval and publication as required by law.

Passed by the City Council, December 22nd, 1902.

Approved by the Mayor, Dec. 23rd, 1902.

T. A. BLAISE,  
*City Clerk.*

C. G. JONES,  
*Mayor.*

Here it will be seen that the paragraph of the formal contract under consideration is expressly provided for by the stipulations (see second paragraph, page 41 of printed record), and the latter part of paragraph 7 (now being considered), of the formal written contract is covered by Ordinance No. 328 which we have copied above and referred to in the specifications (see page 41 of printed record).

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The formal contract then provides (page 162 of printed record), as follows:

"To prevent all disputes and

litigations, it is further agreed by the parties hereto that the City Engineer and Paving Committee shall in all cases determine the amount and quality of the several kinds of work which are to be paid for under this contract; and they shall decide all questions which may arise relative to the execution of the work under this contract on the part of the contractors, subject, however, to confirmation by the Council in case of appeal to Council."

Now, observe the following provision of the specifications, which appears on page 45 of the printed record, being the paragraph immediately preceding the heading "Plans:"

"To prevent any disputes and litigations, it is further agreed by the parties hereto that the Engineer and Construction Committee shall in all cases determine the amount and quality of the several kinds of work which are to be paid for under this contract; and they shall decide all questions which may arise relative to the execution of this contract, on the part of the contractor, and their estimate and decision shall be final and conclusive."

Now, note that the closing words of the specifications are: "And their estimate and decision shall be final and conclusive." The closing words of the paragraph

in the formal contract are "Subject, however, to confirmation by the Council in case of appeal to Council."

The City Engineer and Paving Committee are merely the agents and representatives of the City, carrying out the directions of the City Council. Even if this language did not appear in the contract, the contractor would have the right to appeal to the City Council to have the action of the Paving Committee and the City Engineer reviewed, and the City Council would have the right to review their action and either agree or disagree with the Committee and the City Engineer; and in that event, notwithstanding the language in the specifications that "their estimate and decision shall be final and conclusive," the City Council could review their action and affirm it or modify it. Therefore, the language in the formal contract—"subject however, to confirmation by the Council in case of appeal to Council" adds nothing whatever to the contract that would not be included in it by operation of law, without that language.

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The next paragraph of the formal written contract (page 162 of the printed record), provides "this contract is entered into subject to the approval or rejection of the Council of Oklahoma City,

and it shall not bind either party until so approved or confirmed, and is subject to all city ordinances now in force relating to such matters."

It is insisted by the appellee that by the language used in this paragraph it was the intention of the parties that the City should not be bound until this particular formal contract was executed and approved and confirmed by the City Council. That, however, is not the force of the language used. This language is intended as a restatement of the matters and things already entered into and put in this form as a mere matter of convenience, but if you give this language its technical construction, "this contract," as used in this paragraph, would merely mean this particular instrument, leaving in force the contract already entered into by the resolutions, notices, specifications, bids and awards.

But let us observe the real meaning of the language used. The language is "this contract is entered into subject to the approval or rejection of the Council of the City of Oklahoma City, and it shall not bind either party until so approved and confirmed."

As heretofore pointed out, the city had already approved of McCormick's bids and awarded the contracts to him. The agreement

as to all the terms and conditions were closed and the parties were then considering the formal writing in which this language is incorporated, and it was the intention that this formal instrument should not be binding on either party until it was executed and approved by both. The words "this contract," as used in this clause, are synonymous with the words "this instrument."

The form of the contract was furnished by the city, and under some of the authorities it might be held that the mere furnishing of this contract, insofar as the terms are printed therein, would bind the city. The real contract had already been entered into, but it was the intention of the parties that the written instrument, which should be a restating of that contract already made, should not bind either party until both executed the same.

The contracts to McCormick, however, for the making of these improvements were valid and binding and were in no way affected by the execution of this more formal instrument or the omission of the same.

The latter part of the clause is: "And is subject to all city ordinances now in force relating to such matters. This clause adds nothing to the contract because, under the law, the contract for the let-

ting of the work would be subject to all city ordinances then in force relating to such work. Of course, there was the ordinance or resolution authorizing the letting of the contract and the ordinances or resolutions or motions of the City Council in approving the bids and awarding the contracts—in all those matters the work would have to be done by the contractor, subject to those conditions and provisions. This clause in no way conflicts with the theory that there was a valid existing contract, and as said before, the language "this contract is entered into," in no way detracts from the theory that there were prior valid existing contracts between the City and McCormick for the doing of this work, and the language "this contract," as said before, is synonymous with the words "this instrument is entered into." Nowhere in the plans, specifications, resolutions, notices, bids or awards, is it provided that the contract shall not be binding until the formal written instrument is signed by the respective parties. The formal contract itself does not provide that the previous contract entered into shall not be binding until the formal writing is executed. It merely provides that "this contract"—meaning this particular instrument—shall not be binding until executed by the respective parties. As the specifications do not expressly provide

*that the contracts evidenced by the awards, etc., shall not be binding until the formal written contracts were executed under the authorities heretofore cited the contracts were completed and binding.*

The next paragraph of the contract, bottom page 162 of record, provides:

“It is expressly agreed that the city shall not be held liable for any delay or stoppage of said work by reason of any injunction or other legal proceedings whatever, except as herein provided.”

The statement on the opposite side of this page would be the law, independent of this clause in the contract. Where a city lets a contract for doing certain work and the contractor is enjoined because of some irregularity, it would hardly be contended that the city would be liable for damages by reason thereof. Therefore, this clause is not inconsistent with the specifications or the bids or the awards, but is in harmony therewith. It merely stated in this formal instrument what is implied by law independent thereof and besides the clause is for the benefit of the city and was an extra concession on behalf of McCormick.

The next clause of the contract (page 163 of printed record), provides that "it is further agreed that in the doing of the work under this contract, eight hours shall constitute a day's work, as provided in Ordinance 763, and the laws of the State of Oklahoma, and no person doing work under this contract shall be required to work longer than eight hours each day."

Apparently this provision is not found in the specifications or in the notices or in the resolutions, but it is provided for by the laws of Oklahoma (See section 3757, Statutes of Oklahoma, 1910, Vol. 1), in which it is provided as follows:

"No. 3757. WORKING DAY FOR PUBLIC EMPLOYEES. Eight hours shall constitute a day's work for all laborers, workman, mechanics, prison guards, janitors and public institutions, or other persons now employed or who may hereafter be employed by or on behalf of the state, or by or on behalf of any county, city, township or other municipality, except in cases of extraordinary emergency which may arise in time of war, or in cases where it may be necessary to work more than eight hours per calendar day for the protection of property or human life; *Provided*, that in all such cases the laborers, workman, mechanics or other persons so employed and



working to exceed eight hours per calendar day shall be paid on the basis of eight hours constituting a day's work; *Provided*, further, that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workman, mechanics, prison guards, janitors in public institutions, or other persons so employed by or on behalf of the State, or any county, city, township, or other municipality, and laborers, workman, mechanics, or other persons employed by contractors or sub-contractors in the execution of any contract or contracts with the state, or with any county, city, township, or other municipality thereof, shall be deemed to be employed by or on behalf of the State, or of such county, city, township or other municipality."

Then section 3758 of the same Statute provides that public contracts are made on the basis of eight hours for a day's work. It is as follows:

"All contracts hereafter made by or on behalf of the State, or by or on behalf of any county, city, township, or other municipality, with any corporation, person or persons, for the performance of any public work, by or on behalf of the State, or any county, city, township, or other municipality, shall be deemed and

considered as made upon the basis of eight hours constituting a day's work; and it shall be unlawful for such corporation, person or persons, to require, aid, abet, assist, connive at, or permit any laborer, workman, mechanic, prison guards, janitors in public institutions, or other person to work more than eight hours per calendar day in doing such work, except in cases and upon the conditions provided in the preceding section."

And then section 3750 of this same Statute provides the penalty for violating the two preceding sections, in the following language:

"Any officer of the State, or of any county, city, township, or other municipality, or any person acting under or for such officer, or any contractor with the State, or any county, city, township, or other municipality thereof, or other persons violating any of the provisions of the two sections, shall for each offense be fined in any sum not less than fifty dollars, nor more than five hundred dollars, or punished by imprisonment of not less than three months nor more than six months. Each day such violation continues shall constitute a separate offense."

The above was the law before the making of this contract.

Therefore, this paragraph of the contract, on page 163 of the printed record, merely expresses in the

formal written contract that which was already in the contract and constituted a part of it, by virtue of the Statutes of Oklahoma, which we have heretofore quoted. Not only do the Statutes of Oklahoma provide that eight hours shall constitute a day's work, but we direct the court's attention to section 1 of Article 23 of the Constitution of the State of Oklahoma, which provides:

"Eight hours shall constitute a day's work in all cases of improvement, by and on behalf of the State, or any county, or municipality."

The paragraph of the contract under consideration merely stated the existing law, which under every rule of interpretation became a part of the contract itself, and even if this provision were not in the contract, eight hours would constitute a day's work in the making of these improvements, and McCormick would be guilty of a crime if he compelled his men to work longer.

The next clause of the written contract in the second paragraph, which appears on page 163 of record, and is as follows:

"In consideration of the completion by the said contractor of all work embraced in this contract, in strict conformity with the

specifications heretofore referred to, the City agrees to pay to the said contractor, the following prices, viz:”

Then follows a list of the work to be done and the price to be paid therefor.

See page 85 of printed record, where it is shown by the motion that the items appearing in the bids and in the awards of the contracts are exactly the same as those appearing in the paragraph of the contract referred to. Therefore, these agree in every particular.

The items of work and prices therefor, given in the formal contract, are exactly the same as the items and prices stated in McCormick's bids and in the motion of the City Council in which he was awarded the contracts for each piece of work.

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“The city further agrees to pay for said work in street improvement bonds issued by the city, which the contractor agrees to accept at par, the forms of which are to be determined by the parties hereto and embraced in an ordinance or ordinances to be passed by the City Council.”

“The city further agrees that it will cause the levy and collection of assessments against the property liable to the same under the

laws of the State of Oklahoma, and will levy and collect annually, in the manner provided by the laws of the State of Oklahoma, a sufficient tax to pay the bonds so to be issued, with the annual interest thereon as they shall become due; and the city agrees to pay out of the funds when so collected from said levy said bonds and interest promptly when due to the holders of such securities at the office of the City Treasurer of Oklahoma City, and the city agrees to cause to be made promptly the annual collections, as provided by law, of a sufficient amount of money to pay the securities so issued, together with all interest charges."

Now, if the court will turn to page 40 of the printed record it will find this provision:

"When the work of paving any street contracted for is completed the City Engineer shall carefully measure and determine the quantity of each class of work done on which separate prices are fixed and compute the cost thereof according to the terms of the contract. And the aggregate price of the work done and material furnished on said street, less any and all deductions which may be made therefor, in accordance with the terms of this contract, shall, in the event of the faithful performance and acceptance of the work done on

said street, constitute the amount due under this contract for the work done on said street, and this sum the city agrees to levy and collect as a special tax, according to law. And the Mayor and Council of said city, upon the completion and acceptance of the work to be done under contract on any street, shall cause a certificate to be issued against all of the lots, pieces or parcels of ground liable to taxation to pay the cost of the work on the said street, or all unpaid assessments against same according to law.

“The certificate so issued are payable in ten equal annual installments, with interest at the rate of 7 per cent per annum.”

In the formal contract the securities to be issued in payment of the work are designated as “bonds,” whereas in the specifications they are referred to as “certificates.” However, they mean the same and the two terms are used interchangeably as applied to securities of this kind.

These two clauses are identical in their scope and terms. It will also be observed that on page 146 of the printed record, in the notice published by the clerk, it is provided—“The contractor shall receive for the above work, street improvement bonds, at par value, against abutting property, according to House Bill No. 231, ap-

proved April 17, 1908." House Bill No. 231 is the paving law published in the fore part of this brief.

The notice published by the City Clerk refers to the certificates as "bonds," but as said before, these terms are interchangeable.

"It is further agreed and understood by the parties hereto that no deductions shall be made for such delays in the progress of the work as are occasioned by the weather preventing the contractor from pursuing the same, and the said City Engineer shall determine whether or not the weather conditions are such that the work can be carried on."

In the last paragraph on page 42 of the printed record it is expressly provided:

"The days of work lost on this contract, in consequence of injunction or court proceeding, *bad weather*, or work being done by other contractors, corporations or individuals over whom the party of the first part has no control; organized strikes, or destruction by fire or otherwise of any plant where material for this contract is manufactured or made, *shall be added to the number of days specified in the contract within which such work was to be completed.*"

"It is further agreed that all repairs and all pavement required to be made by the contractor during the guarantee period shall be made with materials similar and equal to, and laid in the manner of those described in the specifications for the original improvement. The said contractor hereby expressly promises and agrees to keep said improvements in a first class condition for a period of five years from and after the time of the completion of the same and its acceptance by the city, and agrees further that if it shall fail to do so in any instance, upon notice of ten (10) days in writing given by the Engineer of said city, or the Paving Committee of the Council of said city, to it, such repairs or reconstruction shall be done by said city, and said city is hereby authorized to make such repairs or reconstruction by contract or otherwise, and to pay for the same out of the improvement bonds held by said city as a guarantee for the maintenance of said improvement, or in case said contractor gives bond, then, by suit upon said bond, the cost thereof, and the said contractor will pay the cost of such repairs or reconstruction, together with all expense incurred in the recovery thereof, including a reasonable attorney's fee in making collection, but that no action in any instance for that



purpose shall be a bar to any further or future action on account of any past, future or further failure on the part of the contractor to make such repairs or improvement, except that in case the full amount of the penal sum of the bond for maintenance of such work be exhausted."

It will be observed that the first part of the clause in the contract, on the opposite side of this page, just referred to, merely provides that all repairs and all pavement required to be made by the contractor during the guaranty period shall be made with material similar and equal to, and laid in the manner of those described in the specifications for the original improvements. This clause of the contract would be implied, although not written therein.

Then on page 146 of the printed record, in the notice published by the City Clerk, it is expressly provided that bids will be received for both five-year and ten-year guaranties, and that the contractor will be required to give a bond in the sum of 10% of the contract price as a guaranty of keeping the improvements in a state of good repair for a period of five years if bids are accepted on a five-year guaranty, and in a state of good repair for a period of ten years if bids are accepted on a ten-year guaranty.

The next clause then in the contract, as will be observed, merely provides the length of notice that shall be given by the City Engineer to the contractor for the making of repairs by the contractor, and if the contractor does not make them, the city is authorized to do so and to pay for the same out of improvement bonds held by the city as a guaranty for the maintenance of said improvements, or to collect same from the maintenance bonds.

Now, as to the provisions of the clause in the contract just quoted on the opposite side of this page, we direct the court's attention to page 50 of the printed record, under the heading "*Guarantee.*" It is therein provided the guaranty for imperfection in the work, and that the first party agrees to turn over such improvements at the expiration of a specified time in a good condition, and in a good state of repair.

Then, the specification on page 50 of the printed record provide that the contractor shall at the expiration of such period (being the period guaranteed), turn said improvements over to said city in a good condition and in a good state of repairs. And then it is further provided on the same page of the printed record in the specifications:

"If at any time within the period of guaranty, after the com-

pletion and acceptance of the work herein contracted for, the said work shall, in the judgment of the City Council or the person or persons in charge of said streets and avenues, be required to be repaired or reconstructed, the person or persons in charge of said street shall notify the said first party to make the repairs or reconstruction required, and if the said first party shall neglect to proceed with such repairs within ten (10) days from the date of said notice, and immediately complete the same, then the said second party shall have the right to cause such repairs or reconstruction to be made, in such manner as it and the City Engineer may deem best; and the whole cost thereof, both for labor and material, shall be paid for at the expense of said first party and surety.

“And it is further agreed that if the cost and expense of such repairs or reconstruction shall not be paid by said first party as herein provided, immediately after the same have been completed, the said second party is hereby authorized to sue on said bond for such cost and expense, and recover such amount, together with all costs, including attorney's fee, and such suit shall not be a bar to further recovery on such bond, but said second party may continue to recover for such costs and expenses until said bond is exhausted.”

"It is further agreed that the city shall not in any case become liable for the payment of the cost of paving the spaces occupied by the street car tracks, should such places be paved by the contractor."

Now, if the court will turn to page 44 of the printed record, about the middle of the page, it will find the following language in the specifications:

"It is further agreed that the doing of the work embraced in this contract shall not render the city liable to pay, directly or indirectly, for such work, or any part thereof, otherwise than by levy or special assessment, and issuance of certificates against the lots, tracts and parcels of land liable to be charged therefor, as provided by law, without recourse or liability against the City of Oklahoma City, in any event."

This clause in the specifications is much broader than the clause just referred to in the contract.

"It is further agreed that the contractor shall at the time of the approval of this contract by the Mayor and Council of the city, furnish a construction bond in the amount of 20% of the total amount of the contract price, for the faithful completion of the work in strict conformity to the plans and

specifications of the City Engineer. A copy of said bond is hereto attached; and that upon the approval of said bond by the Mayor and Council, this contract shall become effective."

Now, on page 51 of printed record, last paragraph, under the heading of "*Bids*," it is provided:

"The said first party will be required to furnish at the time of entering into contract for the work herein described, an approved bond to the said second party, in the sum of 20% of contract (\$.....), for the faithful performance of the work, as herein specified, and within the specified time."

These two clauses are practically the same, but the clause in the formal contract provides that "this contract"—referring to that particular instrument—shall become effective upon the approval of the bond by the Mayor and City Council. The language—"this contract"—however, refers to that particular instrument, as the same terms and conditions embraced in that clause were already embraced within the plans and specifications which constituted a part of the completed contract which became effective when the bids of McCormick were approved and the contracts awarded to him.

The above and foregoing provisions of the formal written contracts and the provisions of the contracts evidenced by the specifications, plans, resolutions, notices, bids and awards, are all that are necessary to compare, as we shall comment generally upon the subsequent provisions of the formal written contracts, with no further comparison.

The next clause after those referred to above, in the formal written contracts, provides that the city may retain certificates to the amount of 10% of the contract prices as surety that the said contractor will keep such improvements in good repair for the full period of ten years from and after the acceptance of same by said city. This 10%, as will be observed from the contracts themselves, may be retained in lieu of the maintenance bond, but the contractor has the right, in lieu of leaving the 10% of the contract prices with the City, to furnish a good and sufficient maintenance bond. The maintenance bond is provided for in the specifications and in the statutes.

It is also provided in this section of the contracts that the interest on the 10% bonds held by the city, shall be immediately turned over to the contractor, but that the principal upon each certificates shall be held by the city for the full period (of ten years), but shall be deposited with the City Treasurer as a separate fund upon a time deposit, and the interest thereon shall accrue to the contractor, and that at the end of ten years all of the certificates (or proceeds), shall be turned over to the contractor.

On page 50 of the printed record, under the heading "Guarantee," it will be observed that the specifications specifically provide for a maintenance bond in the sum of 10% of the bid. In the formal written contracts it is merely provided that the securities or certificates issued by the city in payment of the work may be retained by the city in lieu of the bonds. This provision was in the printed contract furnished by the city and no objection has ever been made on the ground that the formal written contract signed by David McCormick was not agreeable to the city as to its form and contents. The contract entered into by The Conway Company is in the same form, which conclusively shows that it was not the contents of the formal writing executed by McCormick that the city objected to, and no such objection has ever been raised. The contention of the city at all times has been that it never made a contract, but McCormick offered to do and perform all things which in law or equity he should be required to do, and still the city refused to carry out its contract.

The next clause of the formal written contracts is merely to the effect that the city will pass and adopt such ordinances, orders, resolutions, etc., in conformity with the laws of the State of Oklahoma as will give the bonds (referring to the certificates issued in payment of the improvements) the highest bidder possible market value, etc., and that the city will perform all the obligations imposed

upon it by the contracts and laws of the State of Oklahoma promptly, without unnecessary delay, etc.

The city would be under obligations to do all of those matters and things, independent of any clause in the formal written contracts. Therefore, the inserting of these clauses in the contracts neither adds to nor detracts from the same.

The next provision in the formal written contracts is "the city agrees that on all cuts made in the said pavement it will require, before issuing a permit for any such cut, a deposit with the City Engineer of a sum of money covering the repairing of such cuts. The contractor shall repair all cuts made on permits issued by the City Engineer within thirty (30) days after the receipt of a notice from the City Engineer, notifying the contractor of the cuts, and the city shall pay to the contractor out of the sum deposited with the City Engineer when the permits are issued, at the prices above specified, for the actual amount of repairs made; said sums to be paid to the contractor when the work is completed and accepted by the City Engineer."

The same provision contained in the foregoing paragraph of the formal written contracts is found in the first paragraph on page 51 of the printed record, in which the city is granted leave to cut any pavement and it is provided the contractor shall restore the pavement upon receiving payment upon the same terms as stated in the contracts.



The next and last clause of the formal written contract is as follows:

“In witness whereof, the contractor, David McCormick, has caused these presents to be signed by its president and attested by its secretary, and the seal of the corporation to be affixed hereto, and the City of Oklahoma has caused these presents to be signed by its Mayor and attested by its Clerk, and the seal of the city to be affixed hereto, the day and year first above written.”

Of course, the City never signed this formal contract. The name of David McCormick was signed by him personally. “The City of Oklahoma City, Oklahoma,” appearing at the end of the contract, is printed on the form, leaving the blank place for the Mayor to sign and the blank for the attestation of the City Clerk.

This last clause recites that this instrument was executed by the city, but of course it was not. This is merely the closing language of the contract, and the other places in this writing in which the language “this contract” is used, as stated before, refers to this particular instrument. This particular instrument never received any force or effect as an executed instrument on behalf of the city, because the city never signed the same. It is the form furnished by the city and it was executed by McCormick because he had agreed with the city that he would execute this formal writing, but the language “this contract,” as used in this instrument merely means the same as though it had said

"this writing," or "this instrument." In the specifications repeatedly the language "this contract" is used. Everything connected with the whole transaction, clearly shows that the minds of the parties met when the city awarded the contracts to David McCormick for the doing of the work. The statute provides for the construction bonds, the specifications provided for the same and so do the contracts. Those bonds were executed by McCormick and tendered to the city with the contract. Everything that McCormick could do was done by him, and when the awards were made, final and binding contracts were consummated, and it was immaterial in fact as to whether or not any other writing was executed by the parties, except the construction bonds which were executed by McCormick, but the executing of the construction bonds was not part of the contracts. That was provided by the statute, and it was his duty in the fulfillment and performance of the contracts and in conformity therewith, to give a bond. That was one of the provisions of the contracts, the same as doing any of the work named therein.

As we have heretofore urged, it was immaterial whether or not McCormick executed the formal written contract, and the consummation of the contracts for the work did not depend upon the execution of the formal writing, because under all of the authorities the doctrine is laid down, as shown in the foregoing decisions cited in this brief—that in order to make the contract depend upon the formal writing in this case it would have been necessary for the city

to expressly provide in either the specifications, resolutions or notices, or the awards, that the awards should not become binding contracts until the formal written contract referred to in the specifications was executed. No such provision is found anywhere in either the specifications, resolutions, notices or awards. McCormick signed the writing prepared by the city,—the city refused,—McCormick could do nothing further except to go ahead and perform the work under the terms of the agreement and contracts already entered into and evidenced by the awards and that which preceded them. McCormick had even purchased a part of the material with which to do the work. He was ready to go ahead and make the improvements. The city refused to permit him to do so, wrongfully giving the work to another. The city has violated its solemn contract. It is bound to the fulfillment of its contracts and obligations the same as an individual. The city, in letting these contracts to McCormick, did not act in its governmental capacity but in its contractual capacity, in which capacity it is bound by the same rules of law as any ordinary individual. If the facts presented in this case involved an individual instead of a municipality, in our opinion there would be no hesitancy in granting the relief prayed.

The comparison of the formal written contract signed by McCormick, and which the city refused to sign, with the specifications, will show that there is practically no difference whatever between them. Indeed it is remarkable that the variations between these two instruments are so slight

It is perfectly apparent that the city in preparing these formal written contracts, which are furnished to all contractors, has been able to follow the provisions of the specifications, the notices, etc., as it has, and one cannot read the two instruments and compare them without being impressed with the fact that the formal writing was intended to be merely a re-statement in general terms of the contracts entered into by the plans, specifications, notices, bids and awards. To be sure, the specifications are much fuller than the formal written contracts, but as said before, the formal written contracts are general in their terms, while the specifications go into detail. Not a single provision can be found in the formal written contract which requires either of the parties to do anything which has not already been provided for by the specifications, resolutions, notices, bids or awards.

We fear that the lower courts have given undue weight and consideration to the fact that the defendant is a municipality and that the payment of any judgment recovered in this case would be taken from the public treasury. This, however, is immaterial. The wrong is the wrong of the city. A man who acted in good faith and had rights under valid and existing contracts, has been deprived thereof, and a wrong having been done by the city, it is just and proper that it should answer, in damages if necessary, to the appellant in this case, in such sum as will compensate him for the injury which he has sustained; and notwithstanding the lower courts have decided adversely to our

position in this case, we present the record and the authorities to this court with full confidence in the correctness of our position, believing that the right is with the appellant and that right will ultimately prevail.

Respectfully submitted,

B. F. BURWELL,

*Attorney and Solicitor for Appellant.*

JAMES D. MAHER

In the  
**Supreme Court of the United States**

October Term, 1914

David McCormick,

*Appellant,*

vs.

The City of Oklahoma City *et al.*,

*Appellees.*

No. 170

Appeal From United States Circuit Court of Appeals for the  
Eighth Circuit.

**APPELLANT'S REPLY BRIEF**

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In the  
**Supreme Court of the United States**  
**October Term, 1914**

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David McCormick,

*Appellant,*

vs.

The City of Oklahoma City *et al.*,

*Appellees.*

} **No. 170**

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**Appeal From United States Circuit Court of Appeals for the  
Eighth Circuit.**

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**APPELLANT'S REPLY BRIEF**

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**FIRST PROPOSITION OF APPELLEES.**

**Not Guilty of Laches.**

In our reply brief we wish to direct the court's attention to the different phases of this suit as outlined by the attorneys for the appellee in their answer brief.

The first proposition laid down by the appellees is that the appellant was guilty of laches, in that it failed

to prosecute its action with due diligence. For instance: On page 63 of their brief, they say:

“The contracts and bonds of the Conway Company were approved on the 16th day of November, 1908, and not until the 30th day of January, 1909, about two and one-half months after the contracts were awarded and approved, after the Conway Company had spent many thousands of dollars in the performance of their contracts, some of the streets actually completed, others nearly so, and a vast number of employees at work, plants and machinery brought from a distance and on the ground, operation under the contracts so awarded them in full blast, all with the positive knowledge of the appellant, who sat idly by and permitted this company to go about in the performance of its work and expenditure of its money under contracts that were colorably valid, without a word of protest in this court,” etc.

The statement of counsel as to the improvements that were made at the time this suit was begun is not supported by the evidence. Counsel evidently refers to the testimony of Mr. Burke, the City Engineer, which was given at the time of the hearing on the temporary injunction. This hearing for a temporary injunction was had in the United States Circuit Court for the Western District of Oklahoma (now District Court), on March 8, 1909, and Mr. Burke—when he stated that certain work had been done on the streets—was testifying as to the condition on March 8, 1909, but this suit was filed on January 30, 1909, or thirty-six (36) days before the hearing on a temporary injunction. But it cannot be urged with any degree



of sincerity that the appellant in this case was guilty of laches in failing to advise the appellees that he would rely and insist upon the awards made to him. The very brief filed by the appellees clearly refutes any possible contention that the appellant was guilty of laches. Let us observe the facts as shown by the record:

On November 4, 1908, the contracts involved herein and this motion was lost. Then on November 9, 1908, the for the making of these improvements for the eighteen (18) streets were awarded to David McCormick by the City Council of Oklahoma City. On the same day (see page 89 of printed record), Mr. Helm of the City Council moved that the awards to David McCormick be reconsidered City Council sought to reconsider again the awards to 16th day of November, 1908, and on that very day, before David McCormick. On November 10, 1908, the City Council referred the question to the City Attorney as to whether or not the council had the authority to reconsider the awards made to McCormick and to award the contracts to someone else. (See printed record, page 90.) Then on November 11, 1908, after the council had convened, Mr. Burwell, on behalf of McCormick, presented the formal written contracts signed by McCormick and requested that they be executed on behalf of the City. The council on that day reconsidered the awards made to McCormick and awarded the contracts for this same work to the Conway Company. The contracts and bonds to the Conway Company were approved on the

the Conway Company had expended a single cent looking toward the making of such improvements, David McCormick commenced a suit in the District Court within and for Oklahoma County, State of Oklahoma, seeking to enjoin the City and its officers and the Conway Company from in any way interfering with McCormick in making the improvements under the awards made to him and to require the city officers to furnish him the grade stakes and to do those things necessary to enable him to make the improvements under his awards. Upon a hearing upon that application, the temporary injunction was denied.

On December 4, 1908, a demurrer was sustained to the petition and time granted plaintiff in which to file an amended petition. (See page 8 of appellees' brief.) And then on January 25th, ten (10) days additional were granted to the plaintiff to file an amended petition. This extended the time until the 4th day of February, 1909.

Counsel for appellees state in their brief that on the 25th day of January, 1909, the case was dismissed, but was re-instated on the 27th. The present suit was commenced on January 30, 1909, and shortly after this suit was commenced on that date the action in the state court was dismissed without prejudice. As soon as the instant suit was begun, subpoena was issued, notice served of the application for injunction and a restraining order issued by Judge John H. Cotteral on February 18, 1909 (see page 64 of record).

There has not been a day from the 16th of November, 1908—the date on which the contracts were made between the City and the Conway Company—when the appellant in this case has not had an action pending either in the state court or in this court, asserting his rights under the awards made to him. Therefore, the insistence that the appellant has been guilty of laches in failing to prosecute his action is without any merit. Counsel who prepared the brief for the appellees evidently failed to consider the record when he stated on page 63 of his brief that the “appellant sat idly by and permitted this company (referring to the Conway Company) to go about in the performance of its work,” etc. McCormick protested not only before the City Council against the attempt to cancel the awards made to him and against the awarding of the work to the Conway Company and then immediately brought suit in the state court and followed it up by the present action, which has been pending ever since. The Conway Company as well as the city authorities evidenced a disregard of the rights of McCormick, and each and all of them knew of the pendency of the suit in the state court and of the present action brought by McCormick, in which he asserted his rights under the awards made to him. There is not a single element of laches in the bringing of this action.

### **APPELLEES' SECOND PROPOSITION.**

The appellees, on page 64 of their brief, lay down the proposition that the appellant suffered no injury and that the damages claimed are speculative, and that if the appellant suffered any damages or losses they were indirect and speculative, and then they say that such damages were one of the risks which a bidder must assume in attempting to deal with a municipality.

Counsel are evidently laboring under a misapprehension as to the conditions of the record in this case and as to the contentions of the appellant. In the first place, the bids of McCormick were each and all accepted and the work awarded to him, and after that was done, and at the same meeting, a motion was made to reconsider the awards, which motion was overruled; therefore, under the rule of the City Council itself, authorizing a reconsideration of the awards, that body exhausted its powers when a reconsideration was moved and lost by a majority vote. These acts constituted valid and binding contracts between the City and McCormick. His rights attached from that moment and when the appellees say that the City had a right to reject McCormick's bids, they are presenting a statement of fact which is foreign from this record. The City Council did not reject McCormick's bids, but accepted them and awarded him the contracts; then, after the contracts were awarded and a reconsideration denied by a majority vote, the City Council attempted to set aside the awards made

and the contracts which had been entered into. McCormick had valid and binding contracts with the City and whatever profits would accrue in the making of these improvements would be McCormick's, and if the City prevented him from making those improvements and deprived him of those profits under his contracts, it would be liable therefor. No principle of law is more thoroughly established than, for instance, where one has a contract to erect a building, and the owner deprives him of that right under his contract he may sue for damages and recover the profits. Those profits are not speculative. The evidence in the case at bar shows what it would cost to make these improvements. It also shows that the actual profits in making these improvements under the contracts awarded to McCormick would be \$100,000. This evidence is not disputed. It is not speculative, as shown by the following authorities:

*Hinckley v. Pittsburgh Bessemer Steel Co., Ltd.*,  
121 U. S. 264, 30 L. Ed. 967.

*U. S. v. Frank H. Behan*, 110 U. S. 338, 28 L.  
Ed. 168.

*Smith v. Wetmore et al.* (N. Y.), 60 N. E. 419.

*Danforth et al. v. Tenn. & C. R. Co.* (Ala.), 11  
So. 60.

*Salvo v. Duncan et al.* (Wis.), 4 N. W. 332.

*Chapman et al. v. K. C. C. & S. Ry. Co.* (Mo.), 46  
S. W. 646.

*Hammond v. Beeson et al.* (Mo.), 20 S. W. 474.

*Equitable Mortgage Co. v. Weddington et al.*  
(Tex.), 21 S. W. 576.

And in *Birnhank v. Hollander* (N. Y.), 61 N. Y. Supp. 118, the court said:

“Where one agrees with another to furnish material and do work for a specified sum and after part performance of his contract is prevented by the other from completing it, his measure of damages is the difference between the contract price and the amount which it would have cost to perform the contract.”

The rule is also stated by the United States Circuit Court of Appeals for the Fifth Circuit in the case of *M'Elwee v. Bridgeport Land & Improvement Co.*, 54 Fed. Rep. 627, in the following language:

“A party to a contract, who is prevented or excused from fully performing it by the conduct of the other party, may treat the contract as broken and sue, at his election, either for damages and loss of profits or for the value of the services already performed, as upon a *quantum meruit*.”

Counsel cites some authorities to the effect that one has not a right to maintain an action for damages because a municipality refused to award a contract to him, under a law or an advertisement which authorizes a municipality to reject any and all bids. That is not the case at bar. We are not suing because they rejected our bids, but suing because they accepted our bids and awarded the contracts to McCormick and then, after a valid and binding contract was entered into, the municipality sought to set it aside without his consent, which would violate the Constitution of the United States and would be the taking of property with-

out due process of law. A solemn contract made with the City should be upheld as sacredly as when made between two individuals.

None of the cases cited by counsel under this heading were where the awards had been made and the city sought to avoid a consummated contract. Therefore, we say that the attorneys preparing this brief evidently misapprehended not only the record, but the contention of the appellant.

### THIRD PROPOSITION OF APPELLEES.

Under the Appellees' third proposition they say that the City Council performed governmental functions, and had the power to reject bids.

As heretofore stated, we have never contended that the City Council did not have the power and right to reject any and all bids. They did not, however, have the right after a contract was consummated under the statutes to ignore it and award the making of the improvements to someone else. We can see that the City Council could reject any and all bids, but it could not accept bids and then under the rule to reconsider approve the former award, thereby making the contracts binding, and then subsequently by a resolution vacate those awards without the consent of the party to whom the awards were made, which consent was never given. Counsel also cites a long list of authorities to show that the courts have not the power to compel a municipal council to award a contract to a particular individual. The rights of a municipality in the letting of contracts are exactly the same as those of an individual except where limited by statute. It may award a contract to one or refuse to give it to him, at will. The courts cannot control the exercise of that discretion; but the exercise of those powers are not governmental as contended by the appellees, but the city in letting those contracts acts in its contractual relation as shown by the authorities cited in our original brief. We have not asked the court to give



us judgment for damages because the City failed to give us the contracts. If that were our situation we would have no standing in this court. The theory of the appellant in this case is that he had valid and binding contracts for the making of these improvements. The City was attempting to evade those contracts and immediately on the very day that it let the contracts to the Conway Company in violation of the rights of the appellant, he brought a suit in the state court, and while that was pending he brought the present action to compel the City to perform its contract and to enjoin its officers and others from interfering with the appellant in making the improvements under the contract therefor awarded to him by the City. The City and the subsequent contractor—the Conway Company—who is bound by any judgment that may be rendered in this case the same as the City,—ignored the rights of the appellant and went ahead with the improvements, thereby electing to take their chances upon the question as to whether or not the appellant had a valid and binding contract. Since the commencement of this suit it is true the Conway Company has completed its improvements, but the profits made on these improvements belong to David McCormick, the appellant in this case. We were entitled to the equitable relief prayed for at the time of the filing of the bill herein. The defendant City and the Conway Company having made it impossible for equity to give the relief to which we are entitled by their wrongful act since the beginning of this

suit, it is the duty of the court to determine the amount of the profits which David McCormick would have made had he been permitted to make the improvements and to give him a judgment therefor. And in this connection we also wish to call the court's attention to another fact, and that is, the attorneys preparing this brief have evidently overlooked the prayer of the bill. It is true that appellant sets out in the bill itself that under the law the cost of these improvements is to be assessed to the abutting property owners, and the bill prays that the amount of his profits be taken from the taxes levied against these abutting pieces of real estate, but in the event the City shall have paid to the Conway Company the proceeds of these assessments so that there is not sufficient to pay to McCormick the amount of his profits, then we insist that McCormick is entitled to a personal judgment against the City, because in that event, it would be the wrongful act of the City which would prevent McCormick from recovering the amount of his profits from the taxes levied against the abutting property. There is quite a sum yet unpaid on these assessments and these can be applied without injury to the City, at least to the extent that they have not been paid. The City has been collecting these assessments and turning them over to the Conway Company, doing everything within its power to prevent McCormick from recovering anything by reason of these contracts.

Again—long prior to the time of the issuance of the bonds by the City for the payment of this improvement, this action was pending, and has been pending ever since, and anyone taking the bonds would take them with full knowledge of the claim of McCormick. There is no dispute as to the amount of profits which he would have made. The evidence shows that they would have been \$100,000.00. We insist that the City and the Conway Company, having made it impossible for the court to grant full equitable relief, this court should direct that the balance due and to become due for the making of the improvements should be applied to the payment of the damages sustained by McCormick, and in the event that this sum should be insufficient, that then a judgment should go against the City for a sum sufficient to make up the difference.

### APPELLEES' FOURTH PROPOSITION.

It is said by the appellees under their fourth proposition that in the letting of municipal contracts, the officers of a municipality performed not merely ministerial duties, but duties of a judicial and discretionary nature, and the courts, in the absence of fraud or a palpable abuse of the discretion vested in the officers, have no power to control their action.

The appellant in this case has not attempted to control the discretion of the City Council, whose duty it was to let the contracts. The City Council exercised its discretion when it awarded the contracts to McCormick. It also exercised its discretion when, on the motion to rescind, a majority of that body voted in the negative. What we do insist, however, is not that the court shall control the discretion of the City Council, but that it shall not permit the City Council to violate a solemn contract entered into with an individual. We can see that the City Council exercised discretion in the original letting of the contract. The City Council, uninterrupted by any order or decree of the court, decided which were the best bids and awarded the contracts, and since it awarded the contracts to the appellant under conditions which constituted a valid and binding contract, we insist that the City shall not be permitted to violate or ignore the same.

On page 81 and the pages following, counsel have cited a long list of authorities to the effect that the courts will not interfere with the discretion of municipal officers in the letting of contracts. As indicated before, that question

is not involved in this case, and we do not deny that doctrine. Counsel, however, on page 85 of appellees' brief, say:

“Until final action has been taken by a city council on proposals for street improvements, a contract for such improvement is incomplete, and may be defeated by the refusal of the body to proceed further.”

The converse of this statement is equally true, which is—if the final awards have been made and the minds of the parties have met, then a valid and binding contract exists, and the City cannot refuse to carry out its contract, but must perform it the same as the individual would be required to do if he attempted to avoid the same.

Suppose the City were in the position of insisting that under the awards made to McCormick he should go ahead and complete the improvements and McCormick would then take the position now taken by the City, which would be that he was not bound by those awards? Could it be contended that he could forfeit his contract and ignore his bids and his promises and the obligations entered into by the specifications and notices published, the awards and the acceptance of the bids? Most assuredly not. He could not have escaped the liability which would have arisen by a breach of the awards on his part. If the contracts were binding upon him at the election of the City, they were also binding on the City itself, because one could not be bound unless both were.

### APPELLEES' FIFTH PROPOSITION.

Under the first proposition of the appellee,, as a heading, they ask the question—"did the parties enter into an enforceable contract?" Then they say: "We insist that although there has been substantial agreement, the parties each recognized something remaining to be done to complete its execution, and that so long as this condition continued to exist, that there was not the meeting of minds necessary to constitute a completed contract," etc.

It will be observed by this language that the attorneys and solicitors for the appellees recognized that the minds of the parties had met as to the terms and conditions of the contract, but that because the specifications provided that a formal written contract should be executed that until such contracts were executed by the respective parties the City was not bound. This is not the law. We have pointed out in our original brief many authorities to the effect that where the minds of the parties met upon an agreement, the mere fact that it provided that the agreement should be reduced to writing and formally signed does not prevent the contract from taking immediate effect. The presumption of law is that it becomes an immediate binding contract and it is only where there is an express agreement that the contract agreed upon shall not take effect until formally reduced to writing that the principle contended for by the appellees obtains. We have fully and specifically pointed out this doctrine in our original brief, citing authorities which clearly make that distinction.

Now, in support of this contention, the appellees cite the case of *Cleveland Trinidad Paving Company v. Board of Public Service of Columbus*, 90 N. E. 389.

The Ohio statute expressly provided that contracts for public improvements of this character should be in writing, duly signed by the respective parties. This is made clear by the language used by the court in the opinion. The court in commenting upon the statute involved, said:

"In this case, under the statute cited, it is quite clear that the real substantial object to be attained is the making of the written contract. It is the only contract authorized by the statute, and all that precedes is but preliminary to the efficient object, viz., the written contract. Until that is executed the city is not bound. In the present case the board was authorized to bind the city by the written contract specified in the statute, but was wholly unauthorized to bind the city by any other contract."

Thus it will be seen that in the Ohio case there was no authority to make a contract except by executing the formal writing duly signed. In the case at bar there is no provision of statute for executing a formal written contract. The statute recognizes that the contract is consummated and entered into by the resolution of the City Council, the publishing of the notices to the bidders, the filing of the bids, the acceptance of the bids and the making of the awards by the City Council. No other contract is provided for or contemplated by the statute. Therefore, the doctrine laid down in the Ohio case has no application to the case

at bar. And then again, *in the Ohio case it was expressly provided by statute that notice had to be given to the bidder of the acceptance of his bid. No notice was given to the bidder.* His contract in no sense was completed. The statute had not been complied with. In the case at bar, the final written contract was provided for in the specifications merely as a matter of convenience and amounted only to a re-stating in a more convenient form of the contract already entered into. The very quotation given in appellees' brief from the Ohio case shows that the contract in that case for the making of the improvements could only be entered into under the statute by the formal writing which had not been executed.

The next case cited under this heading by appellees is that of *Mann et al v. Incorporated Town of Rochester*, 157 Ind. —, 63 N. E. 874. The statute of Indiana, like the statute of Ohio, expressly required contracts of that kind to be formal contracts in writing. Mr. Justice Black, in speaking for the court, in that opinion, said:

"It is the purpose of the statute that a contract shall be made and an acceptable bond shall be received, before the bidder shall acquire any right to perform the work. His right is not fixed by the ascertainment that he is the lowest bidder."

And in the Indiana case, the provisions of the contract were never agreed upon, for the court said:

"In connection with the entry of record of the awarding of the contract, as shown by the complaint, it ap-



pears that the board directed its attorney 'to prepare a contract for such work, and forward the same to' the appellants, which he did. It does not appear that the board executed this contract, or dictated its provisions, or had knowledge even of the contents of the instrument. The attorney was directed to prepare 'a contract.' This, of course, did not make the appellee a party to the contract. On the contrary, considering the statute and the action of the board together, it is indicated that the board reserved its right to exercise its discretion 'to decline to contract.' "

In the case at bar, every detail of the contract was agreed upon by the specifications, the bids and the awards. The City had provided the conditions of the contract, had inserted in the specifications every detail of the work to be performed, the material to be used, etc. The bids of McCormick unconditionally agreed to do the work at a stipulated price named in the bids. The accepting of those bids and the awarding of the contracts to McCormick were each and all unconditional. There was a present agreement because the minds of the parties had met, and not even to this day has there been any contention on behalf of the appellees that the minds of the parties did not meet; in other words, that there was any controversy as to any material to be used or work to be performed. Every detail was specified. Nothing remained to be done except, in addition to that, the specifications provided for the entering into of a more formal writing. This, however, as said before, was merely as a matter of convenience. There was nowhere any statement or intimation that the contract al-

ready agreed upon should not be binding until the formal writing was executed. That express provision would be necessary in order to prevent the awards from becoming final and binding contracts.

The next case cited in appellees' brief is that of *State ex rel. Schar et al. v. Noyes et al.* (Nev.), 56 Pac. 946. A cursory reading of this opinion would show that it was not in point in this case. In the body of the opinion the court says:

"The meeting of July 2, 1898, was regular, and the city council, under the provisions of that act, was authorized to accept the bid of the relators, and to make a valid and binding contract respecting the matters shown. Was such contract made or was such action taken by the city council and the relators at that meeting, standing alone, as would bind the city council and the relators, or create any liability under which the relators could claim any right of action? We think not. The order of the city council set up in the petition and admitted by the respondents was not such an acceptance of relators' bid as would, independent of subsequent action, create any liability or any right of action whatever. *The bid of relators was not unconditionally accepted by the city council. It was accepted subject to certain modifications specifically set out in the order itself. No claim or showing is made, either by the pleadings or the evidence, that relators consented or agreed to, or were willing to be bound by, the modifications made; hence there was not, and could not be, any contract or liability under this order.*"

Observe the language used:

*"No claim or showing is made, either by the pleadings or the evidence, that relators consented or agreed*

*to, or were willing to be bound by, the modifications made; hence there was not, and could not be, any contract or liability under this order."*

Now observe the case of *James B. Eads, Plff. in Error, v. City of Carondelet*, 42 Mo. 113, cited by the appellees. The opinion itself sufficiently states the facts and the conclusions of the court:

"No. 381. An ordinance authorizing the mayor to enter into a contract with James B. Eads.

"Be it Ordained by the City Council of the City of Carondelet, as follows:

"Section 1. That the proposition of James B. Eads, addressed to Dr. Wm. Taussig, bearing date 23rd May, 1862, and submitted to the city council at a meeting held on said day, relative to the building within the city limits of the city of Carondelet of six iron gunboats, the erection of machine shops, ways, and the construction of a boat yard, to be a permanent establishment for five years from said date, is hereby accepted by said city.

"Sec. 2. The mayor is hereby authorized and empowered to enter into a written agreement with said James B. Eads, embracing the terms of the proposition mentioned in the first section of this ordinance, and such further conditions as may be deemed necessary, and to close the contract between said city and said Eads; he is further authorized to employ counsel for the purpose of properly drafting the contract or agreement contemplated by said proposition and this ordinance.

"Sec. 3. This ordinance to take effect on and after its passage.

"Approved May 24, 1862."

Then the court, in commenting upon the statute, uses the following language:

“The question here does not relate to the meaning or interpretation of the supposed contract, but is whether there was any contract made and entered into which was binding on the parties. There can be no valid contract unless the parties thereto assent, and they must assent to the same thing in the same sense. (1 Pars. on Cont. 475; 1 Sto. on Cont. §378; *Hazard v. New England Marine Ins. Co.*, 1 Sum. 218; *Greene v. Bateman*, 2 Woodb. & M. 359; *Barlow v. Scott*, 24 N. Y. 40.) In *Honeyman v. Merygatt*, 6 H. L. Cas. 112, a proposition to sell real estate was accepted, subject to the terms of a contract to be arranged between the parties, and it was held that there was no complete contract in the case. An absolute acceptance of a proposal, coupled with any qualification or condition, will not be regarded as a complete contract, because there at no time exists the requisite mutual assent to the same thing in the same sense. And when a parol agreement is assented to, which it is understood between the parties is to be put into writing, it is not binding till it is put in that form. *If we were at liberty to construe the first section of the ordinance alone, and wholly disregard the other parts, we should find no difficulty in finding the existence of a valid contract.* But this we cannot do; the whole ordinance must be taken together to ascertain with what intent it was framed, and what was necessary to be done to carry it into execution and impart to it validity and force. After accepting the proposition of Eads in the first section, the second section proceeds to provide the means for carrying out that acceptance, not merely or exclusively on the terms proposed, but on such further conditions as may be deemed necessary. The mayor is authorized and empowered to enter into a written agreement with Eads, embracing the items of the proposition mentioned in the first section of the ordinance; and, to superadd

further conditions which may be deemed necessary for the purpose of properly drafting the contemplated agreement he is authorized to employ counsel. *A written agreement is expressly provided for and contemplated, with such conditions as the mayor, acting for and in behalf of the city, might deem advisable.* The ordinance was at once communicated to Eads, and he saw the terms and conditions annexed to the acceptance of his proposition. If he intended to hold the city, it was his duty to have the terms agreed upon and the contract closed by writing."

It will be observed that the language used in the first section of the statute referred to was "that the proposition of James B. Eads," etc., "is hereby accepted by said city." Then the second section provides that the contract to be entered into should embrace "such further conditions as may be deemed necessary," etc.

The court, referring to the first section, said: "If we were at liberty to construe the first section of the ordinance alone, and wholly disregard the other parts, *we should find no difficulty in finding the existence of a valid contract.*" The awards made to McCormick for the improvements in question were unconditional—see page 28 of appellant's original brief; the language there used is as follows:

"Moved by McWilliams, seconded by Mr. McDavie, that the bid of David McCormick, being the lowest and best bid, be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Pesek, Johnston, McWilliams and McDavie. Nays: Messrs. Workman, Helm and Land."

No uncertainty whatsoever as to the award and the acceptance of the bid. Each of the other awards was in the same language—positive, unconditional acceptances of the bids.

The case of *Starkey v. The City of Minneapolis*, 19 Minn. 203, is a case in which the minds of the parties never met. The court, however, clearly recognizes the principle for which we contend. It says in the body of the opinion that "the written proposal of the plaintiff was not responsive to the question," and again—"So far, then, we have nothing but an offer by plaintiff to build the sewers in Minneapolis at certain specified rates. To make this obligatory upon the plaintiff, it must have been accepted by the defendant by a simple acceptance, without the introduction of any new terms." This rule was fully complied with in the case at bar.

In the case of *Mississippi & Dominion Steamship Co. Ltd., v. Swift et al.* (Me.), 29 Atl. 1063, also cited by the appellees, the court recognizes that it was understood between the parties that there should be no binding contract until the formal writing was executed by the respective parties, but even under the circumstances of that case the court said:

"The case is by no means free from doubt and difficulty, but due reflection and study of the evidence have at last brought us to the conclusion that what the plaintiff claims to have become a perfected contract on April

5, 1890, by the defendants' letter of that date, was at the most only the acceptance of the proposed basis of a contract, *which was yet to be perfected as to details, and put in writing, and that the defendants did not have, nor signify, any intention to be bound until the written draft had been made and signed.*"

In the case at bar every detail was covered by the specifications.

We will also notice the other authorities cited by appellees under this head in their brief. For instance, in the case of *Hodges et al. v. Sublett* (Ala.), 8 So. 880, the court said:

"Whether there was a complete contract between appellee, who is the plaintiff in the circuit court, and Hodges and Bain, against whom the suit was originally brought, for the erection, for the use as a Masonic hall, of a second story on a church, which plaintiff and one Coleman were at the time engaged in building, is the material and controlling question in the case. *This depends mainly upon the further question whether it was meant and understood by the parties that the agreement should not be binding until it was reduced to writing, and signed by them.* It is an elementary principle that the mutual assent of the parties to the same thing, and in the same sense, is an essential element of every contract. When the parties orally agree upon the terms of the contract, and there is a final assent thereto, so that no variation can be introduced into the writing except by mutual consent, the mere suggestion or intention to put it in writing at a subsequent time is not, of itself, sufficient to show that they did not mean the parol contract to be complete and binding without being put in writing. *Parties may, however, agree verbally upon the terms of a contract, and yet stipulate that it is not to be binding until put in writing; in which case*

such stipulation becomes an operative term of the contract, and, unless reduced to writing, and signed by the parties, it does not constitute a complete and binding agreement."

See the distinction made by this court where the minds of the parties have met as to all the terms of the contract and it is agreed that a formal writing shall be made. *In order to prevent the agreement from taking effect, it must affirmatively be agreed that it shall not take effect until the formal writing is made*—for the court says—"parties may, however, agree verbally upon the terms of a contract and yet stipulate that it is not to be binding until put in writing." If it is not stipulated that it shall not take effect until put in writing, under the law a present contract exists whenever the terms and conditions are agreed upon.

The case of *Congdon v. Darcy*, 46 Vermont 478, in no way changes this rule. One of the conditions of the oral agreement in that case was that one of the parties should have the option to say as to whether or not the contract should be in writing before it took effect.

In the case of *Town of Hamilton v. Chopard et al.* (Wash.), 37 Pac. 472, the court said:

"The plaintiff put in evidence—First, a general ordinance prescribing the method by which its streets should be improved, and assessments thereof made; second, the minutes of a meeting of its common council, from which it only appeared that certain bids for the improvement of Cumberland street were opened in the presence of the council, and that of W. H. Hakes ac-



cepted. These minutes do not contain the amount of any of the bids submitted, so that the acceptance of the bid of W. H. Hakes in no manner informed the court or anybody else of the amount for which he was to do the work specified in the contract."

If the plaintiff in that case had proven his contract he would have been entitled to recover. He failed in his proof. He did not even show the amount of the contract, or the price agreed upon, and failed to show a number of elements which entered into the contract which were necessary to establish before he could recover the amount of improvements.

In the case of *McKee v. The City of Greensburg* (Ind.), 66 N. E. 1009, the city had accepted a bid by a party to make certain improvements, then sought to rescind it. The court merely laid down the rule that the burden was upon the plaintiff to show that a completed contract had been entered into, the court saying that the presumption in the absence of a showing to the contrary would be that the city had a right to rescind the award made. The court said:

"Where, in an action against the city on the ground that it had refused to permit plaintiff to improve a street after accepting his bid, it appears that the proceedings were had under Burns' Rev. St. 1894, §4288 *et seq.*, and that the council entered a resolution rescinding its action in accepting the bid, the burden was on appellant to show that jurisdiction had attached to make the improvement.

"If the city had embarked on an *ultra vires* undertaking its action was proper."

The only thing that this case decides which has any bearing upon the case at bar at all is that it would be incumbent upon the appellant in this case to show that the city had jurisdiction and authority to make the contract in question. This we have already shown and there is no controversy about any of the proceedings up to the letting of the contract to McCormick being regular and valid. The question involved in the case last referred to is not involved in the case at bar at all.

The case of *Smart et al. v. City of Philadelphia* (Pa.), 54 Atl. 1025, merely involved the interpretation of the provision of the charter of the city which specifically provided that a contract on behalf of a municipality should not be binding upon the city until duly signed and executed by the officers of the city and the party contracted with. We call the court's attention to the syllabus of that case and one paragraph from the body of the opinion, as follows:

"1. The charter of the city of Philadelphia, Art. 14 (P. L. 1885, p. 15), providing that all contracts as to city affairs shall be in writing, signed and executed in the name of the city, is mandatory.

"2. Where a bid submitted to the city of Philadelphia is accepted, but the city subsequently refuses to enter into a written contract in the matter, it is not liable to the contractor for a breach of the contract."

\* \* \* \* \*

"Article 14 of the charter of Philadelphia declares that 'all contracts relating to city affairs shall be in writing, signed and executed in the name of the city.' P. L. 1885, p. 51. This court has held that this require-

ment of the charter is not merely directory, but mandatory, and that, unless it is strictly complied with, there can be no liability imposed upon the city. *Hepburn v. Philadelphia*, 149 Pa. 335, 24 Atl. 279; *McManus v. Philadelphia*, 201 Pa. 619, 51 Atl. 320. It is therefore settled that a strict adherence to this provision of the city charter will be enforced, and that he who asserts and attempts to enforce any agreement or liability against the city must produce a duly executed contract in writing, signed by an officer authorized to make the same. The reason for exacting a strict compliance with this most salutary requirement of the city's organic law is thus stated by the late Chief Justice Sterrett in *Hepburn v. Philadelphia*, *supra*: 'To hold otherwise would defeat the very object that the legislature had in view in thus specifically prescribing the manner in which all contracts relating to city affairs shall be executed, and expose the public funds to raids of every conceivable form.' "

The opinion of the court is placed squarely upon the provision of the charter. Oklahoma City did not have such a provision, nor was there any such provision in the statutes of Oklahoma. The statute pointed out how a contract should be let and entered into by the city for the making of the improvements in question. Every provision and condition of the statute was complied with literally, and the last one of those provisions which was necessary to constitute a binding contract was the accepting of the bids and the making of the awards to David McCormick.

The other Pennsylvania case cited in appellees' brief is that of *Press Pub. Co. v. City of Pittsburg*, 207 Pa. State 623, 57 Atl. 75. The recorder whose duty it was to sign

the contract in question died before he executed the same. The court merely said that that made no difference. The provisions of the charter were positive and expressly provided that the city should not be bound until the formal writing was signed and executed on behalf of the city. Note the statement in the syllabus of this case:

“Though a contract for advertising has been let by a city under Act March 7, 1901, art. 15 (P. L. 36), as amended by Act June 20, 1901 (P. L. 592), and the award has been accepted, and the contract reduced to writing and accepted by the successful bidder, and delivered by him to the city, no contract exists where such contract is unsigned by the recorder, though such failure to sign is caused by the sudden death of the recorder immediately after the delivery of the contract to him, and before he can affix his signature.”

The last case cited by appellees under this heading is that of *The People's Pass, Railroad Co. v. Memphis Railroad Co.*, 10 Wallace U. S. 38, 19 L. Ed. 844. An examination of this authority clearly shows that the terms of the contract were not agreed upon, but even in that case Mr. Justice Davis dissented.

An examination of these authorities cited by the appellees will make manifest the reason of the appellees in merely citing these authorities without attempting to show how they applied to the question involved. Insofar as these authorities cited by the appellees have any application to the issues involved in this case, they clearly sustain the position which we have taken in our original brief.

### APPELLEES' SIXTH PROPOSITION.

The appellees say on page 98 of their brief that the "appellant knew and acted upon the assumption that the contract was not a completed one." Then in their sixth proposition they said:

"The conduct of the appellant in having his attorney prepare formal written contracts and the offering of them to the City Council for acceptance, and to be signed, contradicts appellant's contention that such formal contracts were not contemplated and the offer and acceptance not conditional upon the execution of final written contracts. Such action is conclusive that appellant knew that something more was contemplated by the parties than the bid and acceptance upon the minutes of the council; and when appellant prepared and signed the formal written contracts it was an admission that he did not regard the bid and acceptance as a completed contract; and if it was not such a completed contract then he is not entitled to maintain this action."

We pointed out in our original brief that the final contract which was finally signed by McCormick and offered to the City for signing by its mayor and city clerk were blanks prepared by the City. The only thing necessary to do was merely to fill in the blank spaces as to name, amount, etc. The City prepared this contract. It was not prepared by counsel for the appellant, but was an instrument prepared by the City, and the only thing the appellant did was to fill in the blank spaces and to sign the same and

offer it to the City for signing. The language upon which great emphasis is placed by appellees, as follows:

“It shall not bind either party until so approved and confirmed,”

appearing in the formal written contract not signed by the City merely refers to that particular instrument, and the language used therein is the same as though it had said this “instrument” or this “writing” is entered into subject to the approval or rejection of the Council of the City of Oklahoma City and it (that is, this writing) shall not bind either party until so approved and confirmed and is subject to all city ordinances now in force relating to such matters. There was already a valid and binding contract, but the City in preparing the formal written contracts, inasmuch as those contracts were prepared by the City, sought to avoid an interpretation that that particular instrument, or those particular instruments, should be binding on the City until they were formally signed by the City. That language in no way affects the contracts already entered into. As used in the formal written contract which the City refused to sign, the words “this contract” are synonymous with the words “this instrument” or “this writing.” The interpretation sought to be placed upon the language by the appellees is unwarranted. There is no intimation of an intention to abandon the contract already entered into. McCormick in signing that instrument was merely trying to carry out to the letter the contract already entered into.

The City had provided in the specifications for a more formal contract, they furnished the blanks containing this very language, and McCormick signed it. This proposition is covered by our brief beginning on page 328 thereof, continuing down to page 332. The authorities cited under this heading by appellees are to the effect that where the terms of a contract are not agreed upon by the respective parties, neither is bound thereby. But where the terms of a contract are agreed upon, it will bind the parties even though it is expressly agreed that a more formal written contract shall be executed by the parties, unless it is expressly agreed that the contract agreed upon shall not be binding until the more formal written contract is written, signed and executed by the respective parties.

Again—the appellees intimate in their brief that McCormick did not execute bonds for the performance of this work. Counsel evidently failed to examine the records of the office of the city clerk, because such an examination would have disclosed the presence of such bonds. The bonds were present at the trial, and no point has ever been made that they were not executed as provided by law. In fact, on page 121 of the record, Mr. Hess, who was City Clerk at the time of the awarding of these contracts, was asked these questions and gave the following answers:

“Q. Mr. McCormick also filed with you the formal bonds on the blanks that are usually used by the city

for that purpose in contracts of this kind, didn't he?

- A. Judge, I could not state that because I never looked at the bonds; the bonds are there for themselves rolled up there; I didn't open them."

The bonds were duly executed and presented with the contracts and the City Council and the officers of the City ignored both the contracts and the bonds and awarded the improvements to the Conway Company, in the face of the existing contract in favor of McCormick. In the light of this situation, even if the bonds had not been filed, it would be immaterial, because McCormick offered to do and perform everything which he was required to do under his contract and the law, but was prevented from so doing by the City. This brings us now to the last proposition laid down by the appellees in their brief.



### SEVENTH PROPOSITION OF APPELLEES.

The contention of the appellees under this heading is that there was no valid binding contract entered into between the City and McCormick, because the City reserved in its specifications and advertisements the right to reject any or all bids and stated that the bidder must enter into a written contract to perform the work and give bond for the proper construction of the improvements.

As we have stated before in this brief, it is not our contention that the City may not reserve the right to reject any and all bids. That right, however, was exercised when the City accepted the bids of David McCormick and rejected the other bids. The negotiations had then reached a point where the minds of both the City and of the bidder agreed upon each and every detail of the improvements to be made, how they should be made, etc.

The provision with reference to entering into a more formal written contract was a mere matter of convenience, as every detail of the contract was already in writing. Not a single element of the contract remained in parol, but was reduced to writing by the resolutions, the advertisements, plans, profiles and specifications, the filing of the bids, the accepting of the bids and the making of the awards. These writings went into detail as to the work. The more formal contract merely referred in general terms

to these various instruments. It in no way would modify the contract already entered into.

We wish also here to refer very briefly to the constant insistence of the attorneys for the appellees that no construction bonds were executed by McCormick. They refer to this fact on pages 128, 136 and 137, as well as on other pages of their brief. Counsel certainly have not examined the record in this case; if so, they could not make the contention which they do in reference to this matter. The record clearly shows that at the very time McCormick offered the formal contracts to be executed to the City, he also presented with them the construction bonds duly executed, and the insistence of counsel that no such bonds were executed by McCormick, either in positive statements or inferentially, is at least a mis-statement of the facts.

In the complainant's bill (see pages 34 and 35 of the record)—in the 15th and 16th paragraphs thereof—appear the following allegations:

"Your orator further alleges and shows to your Honors that within the time provided for by the resolutions, plans, specifications, and notices referred to in this bill in equity, this complainant, after the awards were made to him for the making of the improvements and the paving of the streets upon his bids referred to in this bill in equity, *filed his bonds with the city clerk for the approval of the Mayor of said city, for the faithful performance of said work, and which bonds were each and all for the sum required by the city in its said plans, specifications and notices; and were each*

and all in due form, but that the city of Oklahoma City, through its acting Mayor, refused to approve any of said bonds, and the only reason assigned therefor was that the city (although it had awarded contracts for making improvements referred to in the bids above described), had a right to set aside such awards and the right to refuse to permit your orator to make said improvements. And your orator also represents and shows that the sureties who signed such bonds on his behalf were fully able financially to respond in damages and pay the same should they be required so to do.

"Your orator further alleges and shows to your Honors that within the time provided for in the resolutions of the city council, the plans and specifications of the city engineer, and the notices published by the City Clerk, he tendered to the Acting Mayor of the city of Oklahoma City, and to the City Council, formal written contracts, which embodied the contracts made by the said city and this complainant for the making of the improvements aforesaid, and requested the said Acting Mayor and the said City Council to execute the same, and also offered at the same time to make any changes in said contracts to conform to the agreement as evidenced by the resolutions of the city council, the plans and specifications of the city engineer and the notices published by the city clerk, and the bids or proposals filed by this complainant, should it be found that said formal written contracts did not correctly state the said contract, but that said Mayor and City Council wholly failed and neglected to sign the same, although said contracts were each signed in due form, and said defendant, City of Oklahoma City, and its officers have wholly neglected, failed and refused to carry out its said contracts with this complainant, and have neglected, failed, and refused to permit him to make said improvements under his said contracts, although said complainant, through one of his attorneys, B. F. Burwell, of the firm of Burwell,

Crockett & Johnson, demanded of said Mayor and City Council on the 11th day of November, 1908, *that the said city execute said formal written contracts and approve the bonds of this complainant referred to in this bill in equity.* And your orator alleges and shows to your Honors that he has done and performed all of the matters and things required of him on his part, under the terms and conditions of his said contracts, and has offered to do and perform any and all matters and things necessary to make said improvements, but that the said City of Oklahoma City, and its officers named as defendants in this case, have wholly neglected, failed and refused to carry out and perform the terms and conditions of said contracts with reference to said improvements, although requested so to do. And your orator further alleges and shows to your honors that prior to the time that the Mayor and City Council of the said City of Oklahoma City, on November 11, 1908, attempted to set aside and vacate the awards made to this complainant for the improvements referred to in this bill in equity, this complainant had commenced work under the said contracts and had done some grading on some of the streets for the paving of which awards had been made to this complainant as alleged in this bill in equity."

Now, the defendants nowhere in their answer deny that these bonds were executed and tendered to the Mayor and City Council for their approval, or that the bonds were not sufficient, or that they were not in due form, but they refused to approve the bonds merely upon the theory that they had a right to vacate the awards made to McCormick. The answer of defendants appears on page 70 of the

printed record, and the fourth paragraph of the answer refers to this particular matter. It is as follows:

“That by the terms of such resolutions and the laws of the State of Oklahoma, the said plaintiff was required to make and execute an approved bond for the construction of such work and also to make and execute an approved bond for the maintenance thereof; and that such conditions were by law precedent to the execution of such contracts. *That the defendants did not approve any bonds of the plaintiff, and did not enter into any contract with the said plaintiff for the performance of such work.*”

It will be observed from the defendant's answer, as shown by the quotation above, that they do not deny that the complainant executed and tendered the construction bonds in due form; nor do they deny that the sureties were sufficient. It leaves the record stand upon the allegation in the bill that the bonds were executed and filed, that the sureties were sufficient, and that the bonds were rejected merely because the Mayor and City Council claimed that they had a right to vacate the awards made to McCormick. They rest upon the sole contention, as shown by their answer, that the defendants (the city officials) did not approve any bonds of the complainants and did not enter into any contract with the said plaintiff for the performance of such work. We nowhere have claimed that the bonds were approved, but on the contrary alleged specifically in our bill that they were not, but that they were in form, were executed by sufficient sureties, and in law should have been ap-

proved; as to the maintenance bonds, we merely wish to make this suggestion at this time:

The construction bonds, as the language imports, are bonds to guarantee the proper construction of the improvements. The maintenance bond is a bond in which it is agreed that the contractor will maintain the streets in good repair for a period of a given number of years—in the case at bar, for ten years. The rule is and always has been, that this bond is not executed as a part of the contract; it is a condition subsequent, and the City has never required that the maintenance bond be executed prior to the time of the completion of the work. What the City has always done is this—and being a condition subsequent they had a right to thus handle it—the contractor would complete the work, but before the City would deliver to the contractor the bonds in payment for the work, it would require him to execute this maintenance bond. Otherwise, the bonds themselves would remain in the hands of the city treasurer in lieu of the maintenance bond. The maintenance bond is not part of the making of the contract—it is a condition subsequent to the entering into of the contract—and this is also true with reference to the construction bonds. The party merely agrees in the contract, within a given time, to execute a construction bond and he has that length of time after the award is made in which to execute it.

One additional fact which we have already referred to is that Mr. Hess, the former City Clerk, testified in effect



that the bonds had been filed and were present in court at the time of the hearing on temporary injunction. (See page 121 of the printed record.) On cross-examination Mr. Hess was asked this question and gave the following answer:

"Q. Mr. McCormick also filed with you the formal bonds on the blanks that are usually used by the city for that purpose in contracts of this kind, didn't he?

A. Judge, I could not state that because I never looked at the bonds; the bonds are there for themselves rolled up there; I didn't open them."

This shows that bonds were filed, that the bonds were in the hands of the City Clerk, and the bill alleges that the bonds were in due form, executed on the blanks prepared by the City, that the sureties were sufficient, and that the City failed to approve the bonds merely because they claimed the right to reconsider the awards to McCormick and awarded the contracts to someone else. These allegations stand admitted, because they are nowhere denied by the defendants' answer. Therefore, the constant insistence of the attorneys for the appellees that no bonds were executed or filed by the appellant is without any foundation whatever and in conflict with the facts in this case, as the record shows.

On page 105 of appellees' brief, they make this positive statement: "The record discloses that the appellant has never tendered either a construction or a maintenance bond

as provided by the resolution and notice to contractors and the statute." We have quoted from the bill, the answer and the record, which show how incorrect and unwarranted this statement is.

Counsel in their brief also refer to the fact that the awards of the contracts to McCormick were not in a formal writing communicated to him. We have pointed out in our original brief that the statute nowhere contemplates that such notice shall be given, that the meetings of the City Council are public meetings, the awards of the Council are recorded and the records are public records of which everyone must take notice. The cases cited by counsel which require notice are cases in which in every instance the statute itself provides that written notice of the acceptance of the awards shall be given before it shall become effective. Counsel for appellees in their brief concede that the real question involved in this case is as to whether or not the proceedings which took place constituted a valid and binding contract; and then on page 106 and subsequent pages of their brief, they cite and comment upon certain authorities which they contend sustain their position. To these authorities we wish to direct the court's attention and we insist that even a cursory examination of these authorities clearly shows that they recognize the principle for which we contend and that is—that where the details and conditions of a contract are agreed upon, even though



it be oral, the contract shall be treated as taking effect from that moment, although it is also agreed that it shall subsequently be reduced to writing—*unless there is an affirmative condition and agreement that it shall not take effect until it is reduced to writing.* This principle applies to oral contracts. How much stronger the rule where every detail of the agreement is already in writing and no possibility of any difference of opinion or any disagreement as to any of the terms or conditions of the contract agreed upon.

The first authority cited by appellees is Dillon on Municipal Corporations, 5 Ed., Section 810, in which he says:

“After the opening of the bids, the ascertainment of the lowest or most favorable bidder, and adoption of a resolution that the contract be awarded to him does not make a completed contract between a municipality and the bidder *when the charter requires that all contracts relating to city affairs shall be in writing, or when the advertisement so specifies.*”

It is self-evident that if the charter of a city requires that all contracts shall be reduced to writing and signed by the parties before it shall be binding, no well-informed lawyer would contend that a binding contract could be otherwise executed. The only statement in this paragraph which would give to the appellees any hope whatsoever is the latter part of the clause which says—“or when the advertisement so specifies.” We take it that this language

means that when the advertisement specifies that the contract shall not be binding until formally reduced to writing and executed by the parties. The authorities cited by Mr. Dillon in support of his text do not support any other theory and would be in conflict with the overruling weight of authority, because no doctrine is more thoroughly established in the law of this country than that the mere agreement to reduce a contract to writing does not prevent the contract from becoming immediately operative *in the absence of a further affirmative condition that it shall not become operative unless so written and executed.*

Now, let us examine the authorities cited by Mr. Dillon in support of his text:

The first case is that of *People's Passenger R. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 38, 19 L. Ed. 844. This case involved the granting of a franchise. Observe the language of the court with reference to whether or not the city was bound by a consummated contract. The court said:

"Granted and accepted, as the charter was, on the condition that the respondents should secure the consent of the City before they could exercise the franchise in question, they are not at liberty to set up any other theory. Conclusive proof that the original arrangement was not concluded, is exhibited in the letter of the president and secretary of the respondent corporation, written after the respondents were organized, and addressed to the Board of Mayor and Aldermen, in which they refer to a contract as one prepared

by the corporation attorney, and say that they are authorized to sign the contract on the part of the corporation. They say they are prepared to give the required bonds as soon as the contract is executed, but they do not pretend that any draft of a contract was ever before presented to the city authorities.

"Nothing of the kind is suggested in the communication, but they speak of the contract as one prepared 'for our signature,' and the bid as 'our bid,' assuming throughout that the persons who made the bid and conducted the negotiations and the corporation respondents are identical, which is a fatal mistake. They are not the same, and it is clear that the proposed contract between those who made the bid and the City was never completed."

In other words, the terms of the contract had never been agreed upon. In the case at bar, every detail of the contract was not only agreed upon, but was reduced to writing.

The next case is that of *Josiah Dunham v. City of Boston*, 12 Allen's Reports 375. That case involved the purchase of certain real estate on behalf of the city. We quote the syllabus of the case:

"A city ordinance provided that the land commissioners of the city should have the disposal of the public lands, subject to the approval of the mayor. The city council authorized the land commissioners to sell a certain lot of land on the same terms as they were authorized to sell the public lands. A. made to them a written offer for it. The land commissioners passed a vote recommending the sale of the interest of the city in the lot to A. for the price offered by him. This vote was sent to the mayor, who wrote his

approval upon it. A deed of the lot to A. was accordingly prepared by the city solicitor, but was never signed. *Held*, that there was no contract on the part of the city, of which A. could enforce specific performance."

In that connection the court said:

"The court are of the opinion that the evidence does not prove that the defendants contracted with the plaintiff for the sale of the land to him. The vote passed on the 11th of August does not import a contract, even when approved by the mayor. It was not communicated to the plaintiff as a contract, and it does not appear that it was intended to be so. On the contrary, it was to be communicated to the proper officers of the city as an authority to them to execute a deed, and it contemplates the deed as the only contract which the city was to make with the plaintiff. It was thus a mere preliminary to the completion of the contract."

The court recognized in that case that the only way the land commissioners of the city could contract for the sale of the land was by executing a deed therefor, and so states. The land commissioners were not authorized to make any other sort of contracts with reference to the sale of the land. There apparently was no authority for the land commissioners to make any other sort of contract except to execute the deed. In the case at bar the statute specifically and in detail points out how the contracts for the making of public improvements of the streets shall be made, and those directions were followed in every detail in the case at bar.

In the case of *Edge Moore Bridge Works v. Inhabitants of Bristol County*, 170 Mass. 528, 49 N. E. 918, and which is also cited by appellees in their brief, page 130, a statute of the state expressly provided that the contract should be in writing, provided that the contract should be recorded in a book kept for that purpose, and that no contract made in violation of the provisions of the statute should be valid against the county, and no payments thereon should be made from the county treasury. It will be observed in that case that the statute expressly required the contract to be reduced to writing before it would be valid, and the court in commenting upon the statute said:

*"In these statutes the purpose of the legislature to prevent wasteful or unnecessary county expenses is clearly manifested, and it is open to doubt whether it would now be in the power of county commissioners to bind a county by a preliminary agreement to enter into a future contract for the construction of a public work."*

The next case is that of *Starkey v. The City of Minneapolis*, 19 Minn. 203. This is also cited in appellees' brief, page 124. The statute required the contract to be in writing. The bid of the defendant was not responsive. The court said:

*"So far, then, we have nothing but an offer by plaintiff to build the sewers in Minneapolis at certain specified rates. To make this obligatory upon the plaintiff, it must have been accepted by the defendant by a simple acceptance, without the introduction of any new terms."*

And then the court says in another paragraph that the written proposal of the plaintiff was not responsive to the question. The petition did not even allege an award of the contract to the plaintiff.

The next case cited is *James B. Eads v. The City of Carondelet*, 42 Mo. 113, which is strongly urged as authority by the appellees (see page 123 of their brief). The case is not in point. This is the case where James B. Eads addressed a proposition to Dr. Wm. Taussig, under date of the 23rd of May, 1862, submitted to the City Council at a meeting held on said date relative to the building within the city limits of the city of Carondelet of six iron gunboats and the erection of machine shops, etc. The city empowered the mayor to enter into a written agreement with Eads, embracing the terms of the proposition mentioned in the first section and such further conditions as might be deemed necessary and to close the contract between the city and Eads. He was further authorized to employ counsel for the purpose of properly drafting the contract or agreement contemplated by the proposition and the ordinance. The first section was definite and positive; the second section modified it by authorizing the mayor to add such other conditions as he might deem proper. The case clearly shows that the terms of the proposed contract were not agreed upon, and that it should be reduced to writing. Therefore, the terms not having been agreed upon, neither party would

be bound until such agreement was reached. This clearly appears from the language of the court. It said:

"If we were at liberty to construe the first section of the ordinance alone, and wholly disregard the other parts, we should find no difficulty in finding the existence of a valid contract."

Why? Because the proposal and the acceptance were both in writing and there were no other elements to be agreed upon in the future. The court clearly holds in that case that under conditions like the case at bar, where the city accepted the bids of McCormick and awarded the contracts to him, those contracts constituted a valid and binding contract in writing and come within the purview of the rule laid down by Mr. Dillon in the section referred to above. In the Missouri case, the parties were merely negotiating for a contract; the terms were not agreed upon. It was understood that the contract should be in writing in order to be binding, and therefore this authority sustains the law as we contend it to be.

In the case of *The Water Commissioners of Jersey City v. John L. Brown*, 32 New Jersey Law Reports 504, the court said:

"A contract does not become complete and binding until reduced to writing and signed, if it appears that such was the intention of the parties."

This language was used in referring to the letting of a contract by a city under a law which required that the con-

tract be reduced to writing. Referring to the act, the court said:

“This act specified, *in a very particular manner*, how proposals for contracts are to be advertised for and made; and requires the contract to be made in writing, and that three copies of each contract shall be taken, one to be deposited with the comptroller of Jersey City, and one to be retained by the commissioners.”

The third, of course, would be delivered to the contractor. This authority is in support of the text of Mr. Dillon, wherein he refers to the charters of cities requiring contracts relating to city affairs to be in writing. It has no bearing upon the mere proposition of the providing for a more formal written contract where the terms are fully agreed upon.

This case is also cited by appellees in their brief at page 110 thereof, and they quote from the opinion at length. On page 110 of their brief, in the quotation from this opinion, the court said:

“A contract does not become complete and binding until reduced to writing and signed, if it appears that such was the intention of the parties.”

But as observed in this opinion, as in all of the others, *it must affirmatively appear that it was the agreement that it should not become binding until the formal written contract is signed.* The court then says in the language quoted, that the terms of the contract were never agreed upon:



that several essential elements of the contract were yet lacking. The court then referring to the resolution passed by the city uses this language:

“This resolution required a written contract to be drawn and executed, as it was made the duty of the board, by the law under which they were acting, to do.”

Then on page 115 of the brief, further quoting from the opinion, appears this language:

“Even in a case between private individuals, where no writing is required, if it appears that the parties, although they have agreed on all the terms to their contract, mean to have them reduced to writing and signed, before the bargain shall be considered as binding, neither party will be bound until that is done.”

Here it will be observed the court clearly recognizes that where the terms of the contract are agreed upon, although it is understood it shall be reduced to writing, *the contract shall take immediate effect unless it is further agreed that it shall not take effect until the formal writing is signed*. The reason, however, even for this rule, is to the end that there may be no misunderstanding as to what the agreement really is. In other words, so that the agreement may be made in writing and not rest in parol; but even that rule does not apply where the contract is already in writing *unless in the written negotiations themselves it is further agreed that it shall not take effect until a more formal contract is signed by the parties*. No such a provision or condition anywhere appears in any of the ne-

gotiations or agreements in the case at bar. The New Jersey case cited above rested upon a statute and not upon the mere agreement that another more formal written contract should be executed.

The case of *Erving v. Mayor, etc., of the City of New York*, 131 N. Y. 133, 29 N. E. 1101, is a case where a party was the lowest bidder for public work. The contract was never awarded to him. The contention of the defendants was that Erving was the lowest bidder and that he and the city, knowing that fact, was equivalent to an award of the contracts to him. However, no award was ever made. The city contended (in the language of the court) that "from the fact that the plaintiff was the lowest bidder, and that he, as well as the commissioners of public works, knew it, the counsel for the defendants asks the court to draw the legal conclusion that the contract was necessarily awarded, in law, to the plaintiff. He contends that no formal act on the part of the commissioners was necessary to constitute an award of the contract, but that when it was ascertained that the plaintiff was the lowest bidder, and had knowledge of that fact, the contract was awarded to him, within the meaning of the law. This is the only point presented by the learned counsel for the defendant in support of this appeal; and, unless he is right in this respect, there is no merit in his case, and the answer was properly treated by the court as sham, and frivolous."

The court held that the city had the right to reject any and all bids,—the lowest bid as well as any other. Where is there any similarity between that case and the one at bar? In the New York case no award was made, no contract entered into. In the case at bar the award was made; the entire contract was thereby reduced to writing; the agreement was consummated, the rights of the parties fixed. The city of New York sought to retain the cash deposit made by the bidder. The court held that it was not entitled to it. In the New York case it was also held that notice of an award had not been given to the contractor in writing, basing that decision upon an express statutory provision. The evidence in the case at bar clearly shows that no formal notice was ever given to any contractor that an award had been made to him on his bid. It has been the universal custom, as shown by the evidence, that contractors be present at the opening and awarding of the bids, and the statute requires the time to be definitely fixed when the awards shall be made so that bidders may be present and personally know of such awards. McCormick was present, in the case at bar, when the awards were made to him.

The next case cited by Mr. Dillon is that of *State v. Noyes*, 25 Nev. 31, 56 Pac. 946. This case is also cited by appellees at page 116 of their brief, and they copy in their brief some six pages of the opinion. In this case there was

an injunction instituted against the City of Reno to prevent the letting of a contract under certain bids. While this injunction was pending, a resolution was passed by the city council providing for the accepting of certain bids, when they were in position to do so, and fixing other qualifications. It was contended that the resolution constituted a binding contract and an acceptance of the bid. The court, however, in the opinion expressly states (see page 120 of appellees' brief):

"The bid of relators was not unconditionally accepted by the city council. It was accepted subject to certain modifications specifically set out in the order itself. No claim or showing is made either by the pleadings or the evidence that relators consented or agreed to, or were willing to be bound by, the modifications made, hence there was not, and could not be, any contract or liability under this order."

A very different case from the one now before the court.

In the case of *Herphurn et ux. v. City of Philadelphia*, 149 Pa. St. 335, 24 Atl. 279, cited by Mr. Dillon in support of his text, we wish to call the court's attention to the fact that under the law it was expressly required that a formal contract should be executed and filed. The syllabus of the opinion is as follows:

"In an action against a city for injuries sustained by the negligent digging of a ditch in its street, the court properly refused to submit to the jury the question whether or not an independent contractor, and not

the city, was liable, when, at the time the accident occurred, the requirements of the city charter (Act June 1, 1885, P. L. 51), that 'all contracts relating to city affairs shall be in writing,' and shall be countersigned by the comptroller, and filed and registered by number, date, and contents in the mayor's office, had not been complied with; the advertisement, bid, and letter of acceptance being insufficient to constitute a valid contract.' "

Article 14 of the city charter provided "all contracts relating to city affairs *shall be in writing, signed and executed in the name of the city by the officer authorized to make the same, after due notice; and in cases not otherwise directed by law or ordinance, such contract shall be made and entered into by the mayor. No contract shall be entered into or executed by the city councils or their committees, but some officer shall be designated by ordinance to enter into and execute the same. All contracts shall be countersigned by the comptroller and filed and registered by number, date, and contents in the mayor's office, and attested copies furnished to the comptroller and to the department charged with the work.*" And then the court, in referring to this charter, said:

"These clear and explicit requirements of the city's organic law are not merely directory. On principle as well as authority they are mandatory. To hold otherwise would defeat the very object that the legislature had in view in thus specifically prescribing the manner in which all contracts relating to city affairs shall be executed."

Two other cases cited by Mr. Dillon are those of *McManus v. City of Philadelphia*, 201 Pennsylvania State 619, 51 Atl. 320, and *Smart v. City of Philadelphia*, 205 Pa. St. 329, 54 Atl. 1025. Each of these cases was controlled by an express provision in the city charter that all contracts on behalf of the city should be reduced to writing, executed by certain officers of the city and duly filed as provided by law. They were controlled exclusively by statute and not by any ordinary rule of law applicable to the making of contracts. In other words, they fell within that class of cases referred to by Mr. Dillon wherein the "charter" required that they should be executed in a certain way.

The next case cited in support of Mr. Dillon's text is that of *Town of Hamilton v. Chopard et al.* (Wash.), 37 Pac 472. That is a case where certain improvements were made and a lien claimed upon certain property by reason of the improvements. The contractor sought to foreclose his lien. Referring to the evidence on the trial, the court said:

"The plaintiff put in evidence,—First, a general ordinance prescribing the method by which its streets should be improved, and assessments therefor made; second, the minutes of a meeting of its common council, from which it only appeared that certain bids for the improvement of Cumberland street were opened in the presence of the council, and that of W. H. Hakes accepted. These minutes do not contain the amount of any of the bids submitted, so that the acceptance of the bid of W. H. Hakes in no manner informed the court

or anybody else of the amount for which he was to do the work specified in the contract."

There was nothing to show the amount of the bids or the sum for which the work was awarded. These two elements being absent, it was held that no contract existed for the doing of the work. If these elements had been present, the clear inference is that the court would have held that the proceedings constituted a valid and binding contract, in the absence of any formal writing outside of the proceedings of the council, the bid, the acceptance of the bid and the making of the award.

The next case cited by Mr. Dillon in support of his text is that of *Fort Madison v. Moore et al.*, 109 Iowa 476, 80 N. W. Rep. 527. In this case the court held that the advertisement for bids by the city and the acceptance of the bid, entered of record, constituted a contract for the performance of the work. In the syllabus, the second paragraph, the court said:

"When the work to be done is fully described in specifications referred to in an advertisement for bids by a city, an acceptance of a bid in writing, entered of record, constitutes a contract for the performance of which a bond may be given."

And then in the body of the opinion the court said that the "evidence is in substantial conflict, and we shall not disturb the finding of the jury because of any matter of fact," but the court determined the law of the case upon the ad-

vertisement, the specifications, bids and awards. The court further said:

"The work to be done was fully described in specifications which were referred to in the advertisement for bids. Defendants' bid, which was in writing, was duly accepted, and the acceptance entered of record. No other contract was made, although the notice for bids provides for such an instrument. Appellants seem to claim something on this account, but we do not see how they can derive any advantage therefrom. There was a contract by the acceptance of defendants' bid, and the bond in suit was given to secure its performance."

Here is a case like the one at bar, where a formal contract was expressly provided for, but notwithstanding that fact the court held that specifications, the advertisements, the bids and the awards constituted a complete contract in writing. Mr. Dillon, in citing this authority, evidently cites it in support of the theory that the very things which were done in the case at bar constituted a contract in writing within the purview of the text cited.

Mr. Dillon a second time cites the case of *Erving v. Mayor, etc., of New York*, 131 N. Y. 133, and in his footnote states in substance that the mere fact that one is the lowest bidder does not entitle him to the contract where the city council has the right to reject any and all bids.

The last case cited by Mr. Dillon is that of *Madden v. Boston*, 177 Mass. 350, 58 N. E. 1024. This case involved negotiations between H. J. Jaquith, as agent for the plain-



tiff, and the trustees of the Franklin Fund, for the purchase of a certain tract of land. The court held that these negotiations which were in the form of an offer to sell and an acceptance, did not cover all of the essential requisites of a contract. For instance, the court said:

“The votes relied on by the plaintiff do not sufficiently designate the boundaries of the lot to answer the requirements of the statute of frauds. *Sherer v. Trowbridge*, 135 Mass. 500. This fact alone is an important, and almost conclusive, indication that the vote of December 19th was intended as a preliminary to a contract instead of a contract binding from that time. Viewing this vote in all its aspects, we have no hesitation in interpreting it as merely an authorization and implied direction to Sanford, and not as the completion of a contract. The facts of the case differ materially from those of *McMannus v. City of Boston*, 171 Mass. 152, 50 N. E. 607.”

Then further commenting, the court said:

“They (referring to the trustees) were not a municipal corporation, whose doings must be shown by public records, but they were managers or trustees acting under the will of Benjamin Franklin.”

This language clearly indicates that if the trustees were a municipal corporation who were required to make a public record of their doings, and the bid and acceptance of the bid by the trustees were specific and certain, it would constitute a valid and binding contract. And this is also demonstrated by the case of *McMannus v. City of Boston* (Mass.), 50 N. E. Rep. 607, just referred to above. In that

case a party offered unconditionally to sell a certain tract of land to the city. This offer was unconditionally accepted by the city. No other contract was entered into. In commenting upon this the court said:

“If this offer to sell was then before the board, the vote concluded a contract with him to purchase the land.”

And so in the instant case. The city, by its specifications, had provided every detail of the contract; the bid of McCormick unconditionally to do the work at a stated price was before the City Council when it accepted his bid, and awarded the contract to him. In the language of the Supreme Court of Massachusetts in the McManus case, the vote accepting the bid of McCormick and the awarding of the contracts to him concluded a contract with him for the making of these improvements.

The court, after using the language just quoted above, then said:

“And if his offer was not then in, the vote was itself an offer to him, and, by his acceptance by the covenant to sell, the vote became part of a contract with him.”

The court then distinguishes the case from others referred to in the opinion and then said:

“But here the vote itself imports a contract of purchase by its own terms, and it must, we think, be construed as a binding agreement to purchase, either upon its passage if the plaintiff's offer to sell was then in, or upon the making of his covenant if that was made after the vote.”

Clearly, under the authorities, valid and binding contracts were consummated between the City and McCormick. As will be observed from a careful review of all of these authorities cited by Mr. Dillon in support of the text quoted by the appellees in their brief, all except one or two of the authorities cited are based upon charter provisions of the city, or upon statutes making it mandatory that contracts on behalf of the city should be reduced to writing and signed by certain officers of the city, and the party contracted with, and in a number of them it was further provided by the charter that the contracts themselves should be recorded in certain books, while in only one or two cases can it be said that they in the slightest degree referred to the provision with reference to a written contract being provided for in the advertisements, and even in them it is clearly indicated that where the terms of a contract are agreed upon it will become immediately operative unless there is an affirmative agreement that it shall not become operative until the formal written contract is signed and executed by the respective parties. This is evidently the doctrine which Mr. Dillon meant to lay down in the text referred to above. If he meant to say that the mere providing in the specifications for a more formal written contract should exclude the consummation of a binding contract prior to the time of its execution, in the absence of an express provision to that effect, he stands alone and unsupported by any of the decisions, so far as we have

been able to find. The authorities are the other way and every case cited by counsel for appellees and every case cited in the opinion by the Circuit Court of Appeals in this case clearly lay down and recognize the rule for which we here contend. We think it fair to assume that Mr. Dillon has reference to specifications which expressly provide that no contract shall be deemed to be entered into until the formal writing is executed.

At page 107 of appellees' brief they quote the following language from Volume 7 of American & English Encyclopaedia of Law (2nd Ed.), page 140, as follows:

"Where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon."

This is the rule for which we have contended throughout this litigation. If the parties make the reduction of the agreement to writing and its signature by the parties a *condition precedent to its completion* it will not be a contract until that is done, but by the agreement itself, in order to prevent the contract from becoming effective, the reducing of the contract to writing and signing by the parties must be made by the agreement a *condition precedent*. Otherwise it will be binding from the moment the parties agree upon the terms of the contract.

Counsel then cite on the same page of their brief

from Volume 20, Am. & Eng. Enc. of Law, 2nd Ed., 1170, the following language:

“A vote accepting a bid is not a contract where a provision is distinctly made for the future execution of a formal contract.”

This language must be read in connection with the language of the same author just used above, which means that a vote accepting a bid is not a contract where a provision is distinctly made that before it shall be binding a formal contract shall be reduced to writing and signed by the parties. The authorities cited in support of this text are:

*Edge Moore Bridge Works v. Bristol County*, 170 Mass. 528; *Danham v. Boston*, 12 Allen (Mass.) 375; *Jersey City Water Com'rs. v. Brown*, 32 N. J. L. 504; *People's Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 38—some of the same authorities cited in support of the text quoted from Mr. Dillon, each one of which we have referred to and commented upon in this brief.

But let us observe what this same author says in connection with this subject, in the same volume and on the same page, 20th Am. & Eng. Enc. of Law, 2nd Ed., 1170:

“Though a bid made in response to an advertisement may be the lowest bid therefor, and in all respects regular and valid, no contract arises *until the acceptance thereof by the city authorities*. But where a bid has been accepted and the contract awarded, a binding contract is created, for the breach of which

the city may be liable in damages, although, it has been held, it is not reduced to writing and signed."

Then counsel for appellees (page 107 of their brief), quote the following language from *Cyc.*, though they fail to cite the volume from which it is taken:

"Where parties are merely negotiating as to the terms of an agreement to be entered into between them, there is no meeting of minds while such agreement is incomplete. Thus, where they intend that their verbal negotiations shall be reduced to writing as the evidence of the terms of their agreement, there is nothing binding on them until the writing is executed."

We have no complaint with this statement of the law. It specifically confines the doctrine to where parties are merely negotiating and where there is no meeting of the minds and where they intend that the verbal negotiations shall be reduced to writing as evidence of the terms of their agreement before it shall be binding. Under such conditions no one would contend that a party would be bound until the minds meet and the writing executed as agreed; but counsel, at page 108 of their brief, use this language:

"We shall therefore assume that where parties have fully agreed upon a contract but have simply decided to reduce it to writing as evidence the contract may be enforced."

This language concedes the right of the appellant to recover in this case. Counsel have not pointed out any-

where in their brief a single condition of the contract which was not fully covered by the resolutions, notices, specifications, plans, bids and awards. The only three points that they make any serious contention about are: First, that the construction bond was not executed, which we have shown by the record is not true; second, that the maintenance bond was not executed, which was not contemplated except as a condition precedent to taking down the bonds for the improvement; and, third, that no time was fixed in the contract for the beginning of the work. This last point we have covered in our original brief, and under the law, as we have shown, there would be read into the contract by operation of law and the statute, that the work should be begun within a reasonable time. The appellees also said in their brief, page 108:

“But if the parties have stipulated in effect that the contract shall only be in force from the time it is reduced to writing and executed there is no completed contract until it is put in writing as agreed.”

We fully agree that this statement enunciated a correct principle of law. Nowhere, however, was it provided that the contract as evidenced by the resolutions, notices, specifications, bids and awards should only be in force from the time of the making of the formal contract referred to therein. Therefore, the terms all having been agreed upon, it took effect from the moment the awards were made.

The next case cited by appellees in support of their contention is that of *Carskaddon v. City of South Bend et al.* (Ind.), 39 N. E. 667. This case involved the purchase of real estate by the city. The statute of frauds of Indiana, Revised Statutes 1894, Section 6629, Revised Statutes 1881, Section 4904, required all contracts pertaining to real estate to be in writing. This contract was not all in writing. It was partly in writing and was partly in parol; it was for this reason that the court struck it down. There was a resolution by the city council and an oral acceptance by the other parties. The court said:

"The resolution but directs a purchase upon the terms stated, and by no possible construction can be held to constitute a purchase. Nor can it be said that the resolution, together with the oral acceptance, constitute a contract to purchase. It is short of a contract, not only in that its terms create no obligation on the part of the appellee, but it is a familiar rule that where contracts are required to be in writing they must be wholly written."

No further comment upon this decision is necessary, in our opinion.

Counsel for appellees refer to the case of *Green v. Cole et al.* (Mo.), 15 S. W. 317. An examination of this opinion will disclose that the court lays down the doctrine that where the parties have agreed upon the terms of a contract, although it is further stipulated that the contract shall be reduced to writing and signed by them respectively, it is binding upon the parties from the time the



terms are agreed upon, although the contract is not reduced to writing and signed by them.

In the case of *Hennessy et al v. Bond*, U. S. Circuit Court of Appeals for Ninth Circuit, 77 Federal Reporter 403, it was merely held that a contract agreement to procure a bond, or agreement for a deed to certain property, and which also provided that the defendant would assign by a separate instrument in writing an interest in such bond or agreement, clearly contemplated a written instrument. The court said:

“From these facts I think it is evident that it was contemplated by Bond that Bailey should procure for him a written agreement; that he did not intend to give him (Bailey) authority to bind him (Bond) to pay \$25,000 upon a verbal agreement of plaintiffs to convey to him certain mining claims.”

The effect of this decision is that it was a part of the agreement that it should not be binding until the written instruments were executed, clearly falling within the rule for which we contend.

Counsel also refer to the case of *Ambler v. Whipple et al.*, 20 Wall. 546-559, 22 L. Ed. 403, as holding that it was necessary to have a written contract formally signed before either party is bound. That is not the holding in that case. It is only where the parties specifically agree that that shall be done as a condition precedent to being

bound that that rule would apply. Note the language used by Mr. Justice Miller in the body of the opinion:

"Admitting all this to be true (referring to certain transactions of the parties), it is very clear that both parties intended to have a written instrument signed by each as the evidence of any contract they might make on that subject, and neither considered any contract concluded until it was fully executed. Under these circumstances Ambler had a right to decline to sign the paper, and until he signed he was not bound by it."

The court clearly by this language states that it was understood by both parties that neither should be bound until the written contract was formally drawn up and signed by them respectively.

The case of *Robert Morrill v. The Tehama Consolidated Mill & Mining Co.*, 10 Nevada 125, cited by appellees in their brief on page 122, recognizes the doctrine merely that where the terms of a contract are agreed upon and it is further stipulated that it shall be in writing, or, if written, shall be signed by the parties before it shall take effect, is not binding upon them until it is so written or signed. Note the language used in the syllabus:

"Where parties enter into an agreement, and the understanding between them is that it is to be reduced to writing, or, if it is already in a written form, that it is to be signed before it is acted upon, or is to take effect, it is not binding upon them until it is so written and signed."

The language "before it is acted upon, or is to take

effect," modifies the language "reduced to writing" and also the language "or, if it is already in a written form," which means that it must be understood and agreed that the contract shall not take effect until it is reduced to writing, or, if written, until it is signed by the respective parties thereto.

The case of *Mississippi & Dominion Steamship Co. v. Swift*, 29 Atl. 1963, is in harmony with the views above expressed. Then counsel cite the case of *Hodges v. Sublett*, 91 Atl. 588, quoting an excerpt therefrom as follows:

"Where the parties orally agree upon the terms of the contract and there is a final assent thereto so that no variation can be introduced into the writing except by mutual consent, the mere suggestion or intention to put it in writing at a subsequent time is not of itself sufficient to show that they did not mean the parol contract to be complete and binding without being put in writing."

So it is in the case now under consideration. The mere reference to the executing of a future formal contract did not prevent the agreement evidenced by the awards to McCormick and that which preceded them from becoming binding contracts, and neither could change any of the terms evidenced by the notices, specifications, bids and awards, without the consent of the other. The court, however, after using the above language, continues in its opinion and says:

"Parties may, however, agree verbally upon the terms of a contract, and yet stipulate that it is not to

be binding until put in writing; in such case such a stipulation becomes an operative term of the contract, and unless reduced to writing and signed by the parties, does not constitute a complete and binding agreement."

Thus it will be seen in order to prevent even an oral agreement, where the terms are all agreed upon, from taking immediate effect, it must affirmatively be stipulated that it is not to be binding until reduced to writing and signed by the parties. No such condition appears in the resolutions, notices, specifications, bids or awards. As no such a condition precedent to the taking effect of the contract appears in any of these instruments, under the well-established rule of law, the contract became complete when the award was made.

The rule is just as plainly and specifically announced in the case of *Fredericks v. Fasnacht*, 30 La. Ann. 117, cited by appellees on page 127 of their brief. Observe the language used by the court in the paragraph quoted:

"The distinction is manifest between those cases in which there is a complete verbal contract which the law does not require to be in writing and a subsequent agreement that it should be reduced to writing, and those in which it is part of the bargain that the contract shall be reduced to writing. In the first class of cases the original verbal contract is in no manner impaired by the failure to carry out the agreement and put it into writing. In the second class of cases the final contract is suspended, the contract is inchoate, incomplete, and it cannot be enforced until it is signed by all the parties."

We do not have before us the volume in which this opinion is reported, but sufficient appears, we think, to show that that court intended to lay down the same doctrine as was announced in the case of *Hodges v. Sablett*, 91 Ala. 588, referred to last above.

The case of *Weitz v. Independent District of Des Moines* (Iowa), 44 N. W. 696, was controlled by statutory provisions.

In the case of *Congdon v. Darcy*, 46 Vt. 478, as one of the conditions of the contract, one of the parties was to determine whether or not he desired the contract to be reduced to writing. This was one of the conditions of the contract—not that it should be reduced to writing, but that he should determine as to whether or not it should be reduced to writing—and the court held that this was one of the essential elements of the contract and until he had determined as to whether or not he wanted the contract reduced to writing the contract itself was not complete and therefore not binding on the parties.

We have already commented upon the case of *Maddon v. The City of Boston*, 58 N. E. 1024.

In the case of *Kalamazoo Novelty Manufacturing Works v. McCakuster*, 40 Mich. 85, the agreement of the parties was not all in writing; the alleged agreement was partly in writing and rested partially in parol. The court

therefore held the parol evidence was admissible. The case was determined upon the issue of fact. In the case now under consideration the entire agreement was evidenced by writing.

The case of *Wm. Peck v. Detroit Novelty Works*, 29 Mich. Rep. 313, involved a private corporation and not a municipal corporation. A resolution of a private corporation not communicated would probably be the same as an individual determining in his own mind to do a particular thing. Unless communicated and formally accepted it would not be binding, but if a private corporation were to advertise for bids to do a particular piece of work and unconditional bids were filed, and in the presence of the bidder the board of directors of the corporation were to accept the bid and award the contract, we assume that no court could be found that would hold that that did not constitute a valid and binding contract. There was also involved in that case, statements of individual directors out of session and not accompanying any official act, and statements made by them in debate when in session, and the court held that such statements were not competent to prove a completed contract between their corporation and the individual for the sale of stock from the latter to the former. It certainly requires a stretch of great imagination to apply the doctrine in that case to the case at bar.

The case of *Platter v. Board of Com'rs. of Elkhart Co.* (Ind.), 2 N. E. 544, was a case in which the commissioners sought to change the location of an asylum. The court merely lays down the rule in that case that "where the statute prescribes the mode in which corporate powers shall be exercised, that mode must be followed, or the acts of the corporate officers will be void." This language refers to the notice to be given by the commissioners and the proceedings to be followed by them in the discharge of their duties pertaining to such matters. It is not pretended anywhere in appellees' brief that the city council did not follow technically each and every provision of the statute with reference to the letting of the contracts in controversy.

On page 133 of appellees' brief they cite the 7th Am. & Eng. Enc. of Law, 2nd Ed., 140, but do not quote therefrom. We wish to quote the language used by the author because it most positively declares the doctrine for which we contend:

"4. FUTURE EXECUTION OF FORMAL CONTRACT—Many cases occur where parties negotiating a contract contemplate that a formal agreement shall be drawn up and signed. The question arises, does such a contemporaneous understanding or agreement make the validity of the contract depend upon its being actually reduced to writing and signed? The true rule may be stated in these words: *Where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its com-*

*pletion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon. But, where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing will not negative the existence of a present contract."*

Counsel also referred to 9th Cyc., page 280. This paragraph lays down the rule that a contract will not be binding until its terms are agreed upon. Then on page 282 the author says:

"On the other hand an agreement to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is in all respects as valid and obligatory as the written contract itself would be if executed. If, therefore, it appears that the minds of the parties have met, that a proposition for a contract has been made by one party and accepted by the other, that the terms of this contract are in all respects definitely understood and agreed upon, and that a part of the mutual understanding is that a written contract embodying these terms shall be drawn and executed by the respective parties, this is an obligatory agreement."

In the appellees' brief, then counsel refer to 28th Cyc. 662. In this paragraph, however, the author says:

"The definite acceptance or rejection of a bid concludes negotiations and makes or unmakes the proposed contract."

Then the paragraph concludes with this language:

"But it seems that the action is not final if it is competent for the council, under parliamentary law, to reconsider its rejection of all bids, and exercise



its discretion to accept, provided no rights have vested meanwhile."

Note the language here. They may reconsider where they have rejected *all bids*. In the instant case, however, they accepted the bids of McCormick unqualifiedly and awarded the contracts to him. Therefore, in the language of the author, the definite acceptance of McCormick's bids concluded negotiations and made the proposed contracts final.

The last case cited by appellees under this subject is that of *Anderson v. Board, etc.*, 26 L. R. A. 707. The board, instead of accepting the bid of the party, rejected it and accepted the bid of another. The board had adopted a rule that they would let the contract to the lowest and best bidder. The board reserved the right to reject any and all bids. Of course, one whose bid is rejected has not a contract for the performing of the work of making the improvement contemplated. Very different is one who in conformity with resolutions, notices, specifications and profiles, at the invitation of a city, files an unconditional bid to make the improvement in conformity with the specifications, plans, and profiles, and whose bid is accepted by the city and the award made to him, and even after the award is made, reconsidered, and the award upheld; that is the case in the present controversy. The case of *Anderson v. Board of President and Directors of the St. Louis*

*Public Schools* is not in point; we would not contend that under such circumstances one had a contract.

Counsel say that "the very fact that the appellant tendered a formal written contract and demanded its execution is to our minds conclusive evidence of the fact that he intended that such a contract should be made and no other. For if none were required, why tender a formal contract and demand its execution?"

The specifications provided that the successful bidder should also enter into a formal contract, a copy of which was prepared and printed in blank by the City. This, however, was as a mere matter of convenience of having the contract itself more succinctly stated. It could not be changed in any particular, and McCormick in signing this formal contract, and in signing and presenting the bonds duly executed, was simply doing that which he had promised to do, but when the City refused to execute them he had a right, under the authorities cited in this brief, to stand upon the contract made by the notices, resolutions, specifications, plans, profiles, bids, acceptance of bids, and awards. We insist, under all of the authorities, that valid and binding contracts were entered into between the City and McCormick, and that the City is bound thereby, and we confidently rely upon the authorities cited in this and in our original brief as fully supporting our contention.

**"COMMENT UPON APPELLANT'S AUTHORITIES."**

Under the above heading the appellees comment upon certain authorities cited in the original brief of the appellant. We shall not take the space necessary to again refer to these authorities or to try to point out what appears to us to be an erroneous conception by counsel for the appellees of these decisions. There are, however, a few statements of fact made by counsel for appellee under this heading to which we wish to direct the court's attention.

On page 138 of appellees' brief they say:

"The court will bear in mind the nature of this suit, that it is an injunction to prevent any other person than the appellant from doing any work of improving the streets set forth in the bill, other than himself, brought more than two months after the work had been under way."

Counsel apparently have failed to comprehend the real character of this suit, which is disclosed by the prayer of the bill at page 38 of the record, wherein the appellant prays—first, that the defendants, the City of Oklahoma City, etc., and each and all of said defendants, be required by a judgment and decree of the court, to specifically perform the contracts entered into between the City of Oklahoma City and the complainant for the making of the improvements described in the resolutions, plans, notices, specifications, etc., and that the city and each of the de-

defendants named in the bill, be required to do and perform each and all of the acts and matters and things required of them under the terms of the contracts entered into between the complainant and the City of Oklahoma City, as evidenced by the resolutions of the City Council, the plans, profiles, specifications and estimates prepared by the City Engineer, the notices published by the City Clerk, the bids or proposals filed by the complainant and the acceptance of said bids and the awarding of the contracts for said improvements made by the Mayor and City Council as detailed in the bill of complainant, which streets to be improved and included in the contracts between the complainant and the said City of Oklahoma City were then described, and the complainant then offered to do and perform any and all matters and things which might be required of him by the terms of the contracts or by the order and decree of the court. In the second paragraph of the prayer, the complainant then prayed that a writ of injunction be made pending the suit, according to the course and practice of the court, out of and under the seal of the court, according to the statute in such case made and provided, directing, commanding, enjoining and restraining the defendant, the City of Oklahoma City, and each of the other defendants, and any and all persons whomsoever, from interfering with this complainant in carrying out and performing the terms and conditions of his contracts for the making of the im-

provements, and enjoining the City and its officers from permitting anyone else to make the improvements, other than the complainant, and enjoining them from furnishing any other person whomsoever, except the complainant, any grade stakes, data, profiles, specifications to aid therein making said improvements and from doing or performing any act which would prevent the complainant from making said improvements or hinder or obstruct him in making the same, and that the order of injunction be so framed and worded as to extend to and be binding upon the defendants and each of them, their agents, employees and representatives, and that the defendants and each of them, their agents and employees, be so enjoined from levying any special assessments and from using any certificates against the lots, tracts and parcels of land to be charged for said improvements to any corporation, firm, person or persons whomsoever, except for the use and benefit of the complainant herein.

Then in the third paragraph of the prayer the complainant asks for a writ of subpoena for the defendants and each of them.

And in the fourth paragraph was the general prayer for such other and further relief in the premises as the nature and circumstances of the case might require.

Thus it will be seen by this court that the bill was not an ordinary bill for an injunction, but prayed for specific

performance and asked in aid thereof that an injunction be granted against the City from interfering with the complainant and from aiding anyone else in doing the work and from levying any assessment or issuing any bonds or tax warrants against the property abutting the improvements, for the use and benefit of anyone whomsoever, except the complainant in this action. Everyone had been charged with full notice of the pendency of this suit and anyone who purchased the bonds issued for the improvements did so at their own peril. But this whole litigation turns upon the question as to whether or not the appellant had valid and existing contracts for the making of these improvements, and this is conceded by the appellees in their brief. If what occurred constituted binding contracts, then, under all of the authorities, we are entitled to the relief prayed for, and if the City during the pendency of the suit has placed itself in a position where it cannot perform the contract, then, of course, damages may be awarded as held by the United States Circuit Court of Appeals in this very case, and in payment of those damages the decree should be that any unpaid balance due or to become due for the making of these improvements should be paid to the appellant, and that judgment should go against the City for any residue thereof, the evidence being undisputed that the damages sustained by reason of the loss of profits in being deprived

of this work and the making of these improvements were \$100,000.

Counsel also refer to the fact that in the specifications and the bids no time is fixed for the commencement of the work, and insist that because in the specifications it is provided, as well as in the bids, that the contractor agreed to commence work within ——— days after signing the contract, and to complete the same within six months after commencement thereof, such blank being left in the specifications and in the bids as to the number of days in which the contractor should begin work left the terms of the contract unconcluded. This is not true. The statutes of Oklahoma which were then in force expressly provided for just such a condition. Section 966 of the Revised Laws of Oklahoma, Annotated, 1910, Harris-Day Code, provides:

“If no time is specified for the performance of an act required to be performed, a reasonable time is allowed.”

Therefore, under this statute, the number of days being left blank, all that would be required of McCormick would be that he should commence the work within a reasonable time in the light of all the surrounding circumstances.

The statement on page 150 of brief of appellees, that “it was understood and agreed between the parties

that no contract should be treated executed until the written contract and the bonds required were approved and accepted between the parties," is not sustained by the record in this case. No such a statement appears in the notices, profiles, plans, specifications, resolutions, bids, acceptance of bids or awards. There is no intimation of any such a condition in any of the instruments referred to, and, as stated before, it is our insistence that the contract was consummated when the award was made, and particularly when it was moved to reconsider the award and the motion voted down. This concluded the matter even under the rules of the council, which were introduced in evidence, for under the authorities cited in our original brief, a rule which authorized the City Council to reconsider a matter, authorizes it to reconsider it only once, and when so reconsidered, then their power is exhausted under the rule.

Appellees also refer on page 152 of their brief to the following language used in the opinion of the trial judge, to-wit:

"It is therefore clear that it was an understanding of both parties that the contract was not complete until it should be properly executed in writing."

Then counsel state that this is a clear finding of fact by the trial court as to what was the intention of the parties relative to the action of the council upon the sub-



mission of the bids. An examination of this opinion, however, will disclose that the court is basing that statement upon the proceedings of the council, the notices given, the plans, profiles, specifications, the bids, the acceptance of the bids and the awards. His conclusion is merely a conclusion of law from an examination of these instruments. It is not a finding of fact. This court has all of those instruments before it and will determine for itself as to whether they constituted a valid and binding contract and will not be bound by any finding or conclusion of law with reference thereto made by the trial court.

The entire context of the language used by the trial court shows clearly that it was merely interpreting the legal force and effect of the instruments referred to above and was not making a finding based upon conflicting oral testimony. It has been the constant effort of the appellees throughout their brief to try to impress upon this court that it is bound by the finding of fact of the court below because it is a finding upon the evidence. It is a well-recognized principle, however, that where the right to recover depends upon written instruments about the authenticity of which there is no controversy, that each court to which the case may go shall determine for itself the legal effect of these instruments and that is what we are asking in this case. Our contention is that the trial court misinterpreted the legal effect of these instruments, our

insistence being that they constituted valid and binding contracts, and the contention of the City has been that they do not. The authorities cited by appellees on page 152 of their brief with reference to findings of fact of the trial court not being disturbed by an appellate court have no application.

Again, immediately following the citation of these authorities on page 153 the statement in the brief that "all bids under the 10-year guaranty were rejected and no bid of the class which appellant made was ever adopted" is not correct. This court, from examination of the record, has doubtless already seen that each and all of the awards made to David McCormick were made upon a ten-year guaranty maintenance basis, and after the City Council had adopted the ten-year maintenance provision as to the bids awarded to McCormick and awarded the contracts to him, and after a motion to reconsider these awards had been voted down, and on a subsequent date the Council then attempted to reconsider these awards on the ten-year basis and to adopt a five-year maintenance guaranty basis and award the making of these improvements to the Conway Company on the five-year guaranty. This, however, only shows that the solicitors and counselors preparing this brief misapprehend the facts of this case all the way through and are presenting their law and their argument under a misconception of what actually occurred

and what the record shows. And again, they say that the City Council were acting under legislative function imposed by the statute relative to the contracting for public improvements. Surely counsel have not examined the authorities upon this proposition; they cite none in support of it, and if they had examined the authorities they would have found, as shown in our original brief, that a city council, in letting contracts for public improvements, does not act in a legislative or judicial capacity, but acts in its contractual capacity, the same as an individual.

And again, on page 156 of appellees' brief, they say:

*"Of course, the essential elements of the contract must be present, the minds must have met, the consideration must be there, and the communication of the acceptance must be shown."*

Each and all of these conditions were present as shown by the record. The minds of the parties met and every detail was agreed upon. The consideration was specifically stated in the bid, and it was accepted by the City and the award of the contract for the improvement made based thereon. The fact of the acceptance of the bids and the making of the awards for the improvements to McCormick was communicated to him because he was personally present in the council chambers when the awards were made, pursuant to the notice given by the City that the bids would be opened and the awards made

at that time, and the only reason for fixing the time for the opening of the bids and the making of the awards is so that the bidder may be present and have knowledge of the awards, and as shown by the record, no notice of an award was ever given to a bidder, but it was the general custom that they should be present, and they were universally present when the awards were made. The fixing of the time when the bids will be opened and the awards made is intended in the law to take the place of giving notice that the award of a contract has been made to an individual. Every element of a completed contract was present and had been complied with when the awards were made and the motion to reconsider the awards voted down.

Notices were never given to the contractors that awards were made to them. Mr. Hess, the City Clerk (see page 119 of the printed record), testified as follows:

“Q. Mr. Hess, how many contracts do you say have been let for public improvements since you have been City Clerk?

A. I say I don't know exactly.

Q. Well, approximately?

A. I said there was over one hundred.

Q. Did you ever send to any of these contractors any written notice that the contracts had been awarded to them?

A. No, sir.”

This testimony shows that not in a single instance was notice of the awarding of a contract ever given to a contractor.

We also wish to make one further observation with reference to the Conway Company not having notice of the contention of the complainant in this case, and that the complainant was guilty of laches in not bringing his suit within reasonable time. The testimony of Mr. Hess shows that before the City Council took action attempting to rescind the awards to Mr. McCormick, Mr. Burwell appeared before the City Council, presented the contracts and bonds and notified the City Council, which was then in session, that if an attempt were made to rescind those awards that proceedings would be brought in court to enforce the same. Mr. John J. McCarthy, the representative of the Conway Company, was present in the council chambers at the time and was perfectly familiar with the proceedings and of the attitude taken by Mr. McCormick with reference to these awards. In fact, on page 112 of the printed record, he testified that at the time of the awarding of the contracts to him he was present; that he was also present at the time the awards were made to David McCormick; that he knew the awards were made to McCormick; that he employed counsel to assist the City Attorney to see whether or not the City had the authority to vacate the awards to McCormick; that in the event the

awards to McCormick were vacated, he expected to profit by the same; that he employed counsel to assist the City Attorney with the object in view and in the hope that the City Council might be induced to reconsider the award to McCormick and that when the motion came up for **reconsideration of awards in the City Council**, he was personally present and heard all of the proceedings on that evening; that he was present when Mr. Burwell asked permission of the City Council to be heard upon the question as to whether or not the council had a right to reconsider those awards; and in addition to all this, the record shows (page 133) by stipulation the following:

“It is here agreed by and between counsel for complainants and defendants that in the case in the District Court of Oklahoma County, McCormick v. City of Oklahoma City and others, by leave of court, Conway Company were made parties defendant and appeared by counsel at the hearing for temporary injunction.”

It will be recalled that the awards were made to the Conway Company on November 11, 1908 (see page 147 of record), that its final contracts and bonds were executed and approved by the City Council on November 16, 1908 (see page 157 of record); on November 16, 1908, the same day, McCormick filed his suit for injunction in the state court. This suit remained pending in that court until after the filing of the bill of complaint in this action. The Conway Company was a party to that suit, as shown by

the stipulation quoted above, on page 133. Therefore, neither the Conway Company, nor the City, are in any position to contend that the complainant was guilty of laches in bringing his suit; they were both parties to the suit in the state court, which was commenced on the very day that the Conway Company's bonds and contracts were approved, which was five days only after the contracts were awarded to it, and the executing and approving of the construction bonds, as well as the maintenance bonds, were conditions subsequent to the entering into the contract; merely a condition of the contract which was to be fulfilled by the complainant on his part the same as he agreed to perform the work under the plans and specifications, and just as the City agreed to deliver the bonds in payment of the work after the work was completed.

**CITY LIABLE FOR DAMAGES IF BALANCE OF  
CONTRACT PRICE NOT PAID IS INSUFFICIENT TO  
PAY FULL AMOUNT OF McCORMICK'S PROFITS.**

The appellees in their brief have insisted that in no event can the City be liable for the damages sustained by the appellant, even though there was a valid and binding contract between the City and McCormick for the making of these improvements. This theory, however, cannot be sustained. In the first place, the contract was not between the property owners whose property abutted the improvements to be made, but was a contract between the City and McCormick. The City did not act as the agent of the property owners, as contended by appellees, but acted on its own behalf, was a principal to the contract and is bound by its terms and conditions. It is true that the specifications provided (see printed record, page 44) that the City should not be directly or indirectly liable to pay for the improvements in controversy, otherwise than by levy or special assessment, and issuance of certificates against the lots, tracts and parcels of land liable to be charged therefor as provided by law. This, however, has reference to the liability of the City in the event the work is done under the contract to McCormick. If McCormick had made these improvements himself, under his contract, then the City would not be liable beyond its duty to levy the assessment and cause the bonds to be issued. Primarily the charge would go against the lots and the in-



debtedness would be evidenced by the certificates or bonds issued by the City; but if the City had failed or refused to cause the assessments to be made and the bonds to be issued—in other words, if it failed or refused to take the necessary steps preliminary to the issuing and delivering of the bonds to the contractor—the City would be directly liable for the injury sustained and a general judgment could go against the City therefor. However, in the case at bar, the City refused to permit McCormick to go ahead and perform his contract. If it had permitted him to proceed, he would have procured his profits for the doing of the work, and the amount of the contract, together with the profits incurred therein, would have been paid by the property owners. And even though the City refused to permit McCormick to do the work, if done by the Conway Company, still McCormick having a legal and binding contract, the injury which he sustained could be paid out of the assessments against the lots abutting the streets improved, and the Conway Company having used its influence to induce the council to breach its contract with the appellant, and having been represented by counsel in the lower court in trying to sustain the City in its attitude, could not be heard to complain. In fact, it is bound by any judgment that may be rendered in this case, as heretofore pointed out in our original brief. There is still a large amount, as we understand, unpaid by the lot

owners on these bonds. This can be applied to the payment of any judgment which may be procured herein, but if this is not sufficient, then the City by its own wrongful act having made it impossible to recover the full amount of damages sustained by Mr. McCormick should be liable on a general judgment against it. The City has manifested an arbitrary disposition to deprive McCormick of any of the profits of this contract by paying over to the Conway Company as fast as collections were made from the property owners the assessments made against the abutting lots by reason of the improvements. We were entitled to an injunction at the time the bill was filed, to prevent the city officers and the City from interfering with McCormick in the making of these improvements. McCormick was also entitled to specific performance on the part of the City and to require it to carry out the terms and conditions of its contract. The City stood in the same position as any private individual, because in the making of this contract it acted in its contractual relation and not in its legislative capacity, as shown by the authorities heretofore cited. It was the duty of McCormick to bring such an action as would secure the application of the moneys to be derived from the improvement itself, instead of trying to make the City liable by a general judgment in the first instance. The bill, as the court will recall, specifically asks that the City be prevented by injunction from paying the assessments derived from the making of

these improvements to the Conway Company. Under any view of this case the complainant at the time of the filing of his bill was entitled to equitable relief, and being entitled to equitable relief, the court would do complete justice between the parties and the City, and in the event there is not enough yet remaining unappropriated of the assessments against the lots to pay McCormick his damages it must respond to the appellant the same as though the work had been completed by McCormick and the City had refused to provide the means by which the improvement could be paid for. In support of these views, we wish to direct the court's attention to the following authorities, which clearly show that the contract is a contract with the City and not with the property owners, although the improvement is to be paid for in the first instance, under the law, by assessments against the abutting property; that if the City should refuse to provide the means for paying for the improvement, it would be directly liable to the contractor, and if the City had made it impossible for the court to render a judgment granting the equitable relief to which the appellant was entitled at the beginning of this suit, then the appellees must respond in damages to the amount of the injury sustained—that is, the reasonable profits under the contract, which the evidence shows to be \$100,000.00.

*Barber Asphalt Paving Company v. City of Denver*,  
72 Federal 336, in the Circuit Court of Appeals for the

Eighth Circuit, is a case which clearly sustains our contention. The syllabus in part states:

"A municipal corporation which contracts to pay for street improvements by assessments upon abutting property is primarily liable to pay the contract price itself, if it has no power to make such assessments, or if it fails to make them, or if the assessments it attempts to make are void."

Then, referring to the liability of the City again in the opinion it said:

"If it had failed to levy the assessment upon the lots abutting upon the improvement, or if it had been without the power to make that levy, and it had thus failed to cause that part of the price to be paid by the owners of those lots, the paving company could have recovered it by a direct action against the city."

McCormick has tried to get the profits of his contract from the proceeds to be levied against the abutting property by reason of the improvements. If he fails in this it will be because the City has wrongfully, in the face of this suit, collected the proceeds and paid them over to the Conway Company.

The next case is *Fort Dodge Electric Light & Power Co. v. City of Fort Dodge* (Iowa), 89 N. W. 7.

See also the case of *Dale et al. v. City of Scranton* (Pa.), 80 Atl. 1110. In that case the court said:

"Where a contract for the paving and grading of streets provides that the fund for the payment of the contract price is to be derived from the assessments

on the property benefited, and that the city is to be liable only for the amounts actually collected upon the assessments as they are collected, but the city delays for four years and more after the completion of the work to make collections, it is liable for the contract price out of its general funds, though it has filed liens and issued writs of *scire facias* within the time prescribed by law.

"Where a contract for the paving and grading of streets provides that the fund for the payment of the contract price is to be derived from assessments, but after a delay of more than four years in making collections, the contractor sues the city, he is entitled to interest from the completion of the work, and not from the date from which interest accrued on the assessment."

See also the case of *Dime Deposit & Discount Bank of Scranton v. City of Scranton* (Pa.), 57 Atl. 770.

Again, the Supreme Court of Kansas, in the case of *Heller v. City of Garden City* (Kan.), 48 Pac. 841, said:

"A city of the second class may contract for planting, maintaining and protecting shade trees on its streets, and for the purpose of paying for the same may make assessments and collect taxes in the same manner as provided for assessing and collecting taxes for sidewalks.

"Such a contract was made by a city, and it was stipulated that assessments on the abutting property should be made and accepted as payment of the contract price of the improvement; but when the work was done the city repudiated the contract, and refused to make assessments or take any of the necessary steps towards providing a fund for the payment of the contractor. *Held*, that the city became liable

to pay the contract price, and that the contractor might maintain an action against it therefor.

"The planting of shade trees upon the streets is an improvement of recognized public benefit, and the power to provide for planting, maintaining and protecting them is expressly conferred upon the cities of the class to which Garden City belongs. Gen. St. 1889, par. 789. As an improvement they are placed on a footing with sidewalks and are provided and paid for in the same manner as sidewalks are provided and paid for. While provision is made that assessments may be levied against abutting property to pay for such improvements, the city is nevertheless primarily liable to those with whom it contracts to make them. Under the authority of the statutes, the city might have made a contract for the planting and maintaining of trees upon the streets and avenues of the city, and to pay the contractor for the same out of the general fund, reimbursing itself later by a special assessment against the abutting property. *City of Leavenworth v. Mills*, 6 Kan. 288; *City of Wyandotte v. Zertz*, 21 Kan. 649; *City of Atchison v. Leu*, 48 Kan. 138, 29 Pac. 467; *Garden City v. Trigg*, 57 Kan. ...., 47 Pac. 524; *King v. City of Frankfort*, 2 Kan. App. 530, 43 Pac. 983. The city and its officers alone are authorized to make and collect assessments, and, where they fail and refuse to take the necessary steps to provide a fund for the payment of the same, the contractor must then look to the city for the contract price of his work or the value of his services. When the city repudiated the contract, and refused to take the necessary steps to collect the fund for the payment of the contractor, he was entirely helpless, and without any means of ever obtaining compensation for his work. It has been suggested that a proceeding might be brought against the officers to compel them to take the steps required under the contract, the ordinance, and the statutes, but there being so

many steps to be taken at different times by different officers, the remedy is wholly inappropriate and inadequate. If the city officers had examined the trees, and issued warrant for the amounts due the contractor, and levied assessments against the improved property to meet the warrants, no general liability would have attached; but their failure and refusal to take these steps, and their final repudiation of the contract, under the authorities, subject the city to a general liability, and the plaintiff was therefore entitled to maintain the action which he brought. In addition to authorities already cited, see *City of Leavenworth v. Stille*, 13 Kan. 539; *City of Atchison v. Byrnes*, 22 Kan. 65; *Fisher v. City of St. Louis*, 44 Mo. 482; *City of Louisville v. Leatherman* (Ky.), 35 S. W. 625; *Barber Asphalt Paving Co. v. City of Harrisburg*, 12 C. C. A. 100, 64 Fed. 283; *Northern Pac. L. & M. Co. v. City of East Portland*, 14 Or. 3, 12 Pac. 4; *District of Columbia v. Lyon*, 161 U. S. 200, 16 Sup. Ct. 450; *Barber Asphalt Pav. Co. v. City of Denver*, 19 C. C. A. 139, 72 Fed. 336. The extent of the liability of the city cannot now be determined, but, as plaintiff alleged a compliance with the provisions of the contract, we think enough was alleged to show that the city was liable for some amount, and therefore the judgment of the district court will be reversed, and the cause remanded for another trial. All the justices concurring."

In this case, the Supreme Court of Kansas expressly approves the doctrine laid down in the case of *Barber Asphalt Paving Co. v. City of Denver*, *supra*.

Attention is also directed to the case of *O'Neil v. City of Portland*, 113 Pac. 655. In that case the court said:

"Where the expense of improving a city street is to be paid from a special fund created by assessment

on abutting property, a failure of the municipality to comply with any of the requirements in the charter, essential to supplying such funds or an unreasonable delay in enforcing such provision or collecting and paying over the money, gives the contractor a right of action *ex delicto* against the corporation for damages, *notwithstanding a provision therein that he shall look for payment only to the special fund.*

“A complaint of a plaintiff who had a contract with a city to improve certain streets, to be paid from assessments collected, alleging that owing to the negligence of the city in making an assessment and its failure to exercise due diligence in prosecuting suits brought by property owners affected, whereby it has already failed to provide a special fund to pay for the improvement for nearly five years, whereby plaintiff has been damaged, states a cause of action.”

And in the body of the opinion the court says:

“The only question presented in this case is the ruling of the circuit court upon the demurrer. The contention of plaintiff is that the city, for nearly five years, has failed to comply with the essential requirements of its charter; has not exercised due diligence in the matter, and has negligently failed to provide the special fund for the payment of plaintiff's warrants; that there has been in this respect an unreasonable delay on the part of defendant, and that it is responsible in damages. Counsel for defendant, in upholding the contention that plaintiff's amended complaint does not state facts sufficient to constitute a cause of action, maintains that the complaint should show that the city is making no effort to supply the fund, and that as long as its right of continuous reassessment remains it cannot be held liable for failure to create such fund. Portland's charter of 1903, Sec. 421, provides that the city shall not be held liable for any portion of the expense of any street improvement as—



essed upon the property benefited thereby, by reason of the inability of the city to collect assessments levied for the payment thereof, but the contractors doing such work shall be required to rely solely upon the fund accruing from the property benefited, assessed and liable thereunder, and shall not compel the city to pay the same out of any other fund, except in cases where for any reason such assessment shall be invalid.

"In this state it is now the settled law that where the expense of improving a city street is to be paid from a special fund, created by assessment on abutting property, a failure of the municipality to comply with any of the requirements of the charter essential to supplying such fund, or an unreasonable delay in enforcing such provision, or collecting and paying over the money, gives the contractor a right of action *ex delicto* against the corporation for damages, in which he is entitled to recover the amount due under the contract with interest, *notwithstanding a provision therein that he shall look for payment only to the special fund, and will not require the municipality by any legal process or otherwise, to pay the same out of any other fund.* *Northern Pac. Lumber Co. v. East Portland*, 14 Or. 3, 12 Pac. 4; *Portland L. & M. Co. v. City of East Portland*, 18 Or. 21, 22 Pac. 536, 6 L. R. A. 290; *Commercial Nat'l. Bank v. Portland*, 24 Or. 188, 33 Pac. 532, 41 Am. St. Rep. 854; *Little v. City of Portland*, 26 Or. 235, 37 Pac. 911; *Jones v. City of Portland*, 35 Or. 512, 58 Pac. 657."

We especially direct the attention of the court to the fact that the charter of the city of Portland provided that the city should not be held liable for any portion of the expense of any street improvement assessed upon the property benefited thereby by reason of the liability of the city

to collect assessments levied for the payment thereof, but that the contractors doing such work should be required to rely solely upon the funds accruing from the property benefited, assessed and liable thereunder and should not compel the city to pay the same out of any other funds except in cases where for any other reason such assessment should be invalid; but notwithstanding this provision of the charter of the city, the court held that the city was absolutely liable, and then the court pointed out the facts in the case of *Northern Pacific Lbr. Co. v. East Portland*, 14 Or. 3, 12 Pac. 4, and stated that in that case the work was completed on August 5, 1884, and before its acceptance action was commenced on September 26th of the same year, and it was held that it was the duty of the common council to have approved or disapproved thereof during the intervening time, and said that the law will not permit the capricious withholding of approval in order to avoid the payment of a just claim, and said that it is contemplated in a contract of this kind that the city must exercise reasonable diligence in making the assessments and in collecting the same in order to prevent liability attaching for the liquidation of the debt out of other funds. And the court in that case also said that under the charter of the city it had full control of the proceedings to be taken to secure the funds and that it was the duty of the city to procure the funds with which to pay said debt, and that the plaintiff or contractor, when he had furnished the labor in

accordance with the contract, and when the same had been accepted, had done all that was required of him to be done. This case clearly refutes the argument of counsel for the appellees that in no circumstances can the city be liable for the damages sustained by the appellant. It was the duty of the City to protect McCormick in his contract. This bill was filed looking toward that end. If the City, by its wrongful act, has prevented the relief to which McCormick was entitled under this bill and under his contracts, then it is directly liable in damages for the loss which he has sustained and which, under the authorities cited in our original brief, may be recovered in this particular action, upon the record in this case.

Again, the Supreme Court of Pennsylvania, in the case of *Gable et al. v. City of Altoona* (Pa.), 49 Atl. 367, said:

"A city issued bonds for payment of street improvements, reciting their issue by virtue of Act May 23, 1889, Art. 15, Sec. 27, providing that in contracts for improvements, the cost of which is to be paid by assessments, the city may agree with the contractor that he shall take an assignment of the assessments in payment, the city not otherwise to be liable, though the assessments be not collectible; or it may issue improvement bonds based solely on the assessments. *Held*, that, the assessments being invalid because of irregularity in the passage of the ordinance, the city was liable on the bonds.

"Where bonds for improvement of a street are issued under Act May 23, 1889, Art. 15, Sec. 27, to be

paid from assessments, Const., Art. 9, Sec. 8, providing that municipal indebtedness shall not be increased beyond a certain amount without the assent of the electors given at an election, does not prevent the city being liable on the bonds, the assessments being invalid because of irregularity in passage of the ordinance, there being no intention when the bonds were issued that the indebtedness should be thereby increased."

And finally, Mr. Dillon, in his work entitled "Municipal Corporations," Volume 2, page 1255, lays down the rule as follows:

"The officers of the city charged with the duty of making the assessment being primarily if not exclusively agents of the city for that purpose and not of the contractor, where the assessment has not been made, or having been made proves to be invalid without any fault on the part of the contractor, *and where through the act or neglect of these officers* subsequently to the making of the contract the city is without power to make an assessment for the purpose of paying the contractor, a general liability attaches to the city to answer to the contractor for the resulting damages, the loss to the contractor therefrom being usually measured by the stipulated price."

If the city itself can be made liable for the whole amount of the improvements because of an omission to take such steps as would enable it to raise the funds from the abutting property, surely it can also be held directly liable for the profits of such a contract when it wrongfully deprives the contractor of the fruits and benefits of his contract, and made it impossible for those profits to

be paid from the funds derived from the assessments against the property itself. There is no distinction in principle.

McCormick, under his contracts, was entitled to the profits which might be made from the improvements contemplated in the awarding of these contracts. The Conway Company knew of the rights of McCormick, employed counsel to defeat them, has been familiar with every step taken and with this litigation from its inception, as well as the suit that was filed in the state court, and remained pending until the beginning of this action. We ask this court to give judgment for the whole amount of damages against the city, and to direct that the unpaid portion of the assessments against the lots in front of which the improvements were made be collected by the City and applied to the payment of the damages sustained by McCormick, as well as directing the City to apply any funds thus derived, in its hands, and which have not already been turned over to the Conway Company or to the bondholders; and then, if the balance of those assessments should be insufficient, or if for any reason the court should find that they could not be so applied, that the City be directed to pay to the appellant the amount of the profits which David McCormick would have made under his contracts.

## **ANSWER TO ADDENDA OF APPELLEE'S ANSWER BRIEF.**

As we were about completing the foregoing brief, the attorneys and solicitors for the appellees handed us a typewritten sheet headed "Addenda" and marked "80½." This typewritten matter covers just one page and counsel direct the attention of the court to the case of *Turner et al. v. The City of Guthrie*, 13 Okla. 26, 73 Pac. 283, and they start out by saying:

"The Supreme Court of the jurisdiction of Oklahoma, when the latter was a territory, in a unanimous opinion, concurred in by the learned counsel for the appellant, when he was sitting as a member of that bench, has accepted and adopted the identical principles contended for by the appellees in this case."

It certainly requires unusually developed imaginative powers for one to in any way reconcile the case referred to and the instant case as similar, or as involving the same principles. The case of *Turner et al. v. City of Guthrie* was not a paving case, nor did it involve a contract for the making of public improvements of any kind or character.

Immediately after Oklahoma was opened to settlement, and before the organization of the territory, persons located and established villages which were known as "Guthrie," "East Guthrie," "West Guthrie" and "Capitol Hill." These villages, prior to the organization of the territory and the putting in force of any statutes governing villages or cities in Oklahoma, in the administration of their affairs created certain liabilities—just such liabilities as would be created by any village in the administration

of its affairs—but as there was no law under which these villages could create any indebtedness, the claims against them were void and could not be enforced. However, the legislature of the Territory of Oklahoma, after the organization of the territory, and on December 25, 1890, enacted a law consolidating the villages of Guthrie, East Guthrie, West Guthrie and Capitol Hill, and empowered the District Judge of Logan County, who was appointed by the President of the United States and held his office by virtue of such appointment, to appoint three disinterested persons to act as a commission or as referees to inquire into and pass upon all claims and demands of every character theretofore issued by the city governments mentioned in the caption of the act, for all purposes.

Section 4 of the Act expressly provided:

“Sec. 4. That after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they shall make a report to the district court of same, showing the names and amounts allowed by them, and also all claims and the names of persons and amounts disallowed by them, for approval or disapproval of the district judge. And all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the village to the holders and owners, payable in installments, each of the amounts to be in one, two, three, four and five years, to bear interest at the rate of six per cent per annum from the date of the allowance by the commission or referees, and said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each subdivision heretofore constituting Guthrie, East

Guthrie, West Guthrie and Capitol Hill, according to the amount of indebtedness created by the city councils, the mayors and school boards, heretofore acting for and in behalf of the people resident of said cities. Each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them."

Now, it will be observed that this section expressly provides:

*"And all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the village to the holders and owners, payable in installments, each of the amounts to be in one, two, three, four and five years, to bear interest at the rate of six per cent per annum from the date of the allowance by the commission or referees, and said mayor and council of the village of Guthrie, shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each subdivision heretofore constituting Guthrie, East Guthrie, West Guthrie, and Capitol Hill, according to the amount of indebtedness created by the city councils, the mayors and school boards heretofore acting for and in behalf of the people resident of said cities. Each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them."*

In the first place, their claims against the various villages were void and could not be enforced. The act of the legislature authorized the district judge to appoint a commission or referees to determine what bills in good conscience ought to be paid. It expressly, however, limited



the recovery to taxes to be raised upon the property of the *respective villages which created the indebtedness.*

The contention of the attorneys in the case of *Turner et al. v. City of Guthrie, supra*, was that the officers of the consolidated village of Guthrie having failed to raise the taxes with which to pay the claims of one of the villages, that the entire city was liable therefor. This, of course, could not be true, because in the first place the legislature could either authorize the payment or refuse to recognize it entirely, because it was not an enforceable claim. There was no contractual relation between the consolidated city of Guthrie and the plaintiff Turner, and the legislature limited recovery to the taxes of the villages creating the indebtedness.

If the Turner suit had been an action against the villages creating the original indebtedness, a very different situation would have been presented. However, the plaintiff did not seek to enforce his claim against the village which under the act of the legislature owed the debt, but sought to enforce it against the entire consolidated city, which was prohibited by the act which recognized the various claims and authorized their payment. The same principle was involved in the Turner case as is involved in the ordinary consolidation of cities. The general rule is, where two cities consolidate, that each of the municipalities continues to be liable for its indebtedness existing at the time of the con-

solidation. The court, in that case, did not have before it a question of paying damages sustained by a contractor because a municipality had refused to permit him to complete the improvements of the streets under his contract, and, besides, counsel for the appellees in this case failed to recognize that the appellant is not in the position of one who has completed the paving of a street and brought a direct action against the city for the paving of the streets instead of requiring the city by mandamus to levy the assessments and collect the taxes under the statute. The appellant, in principle, is in the same position as though the city had collected the assessments and had the money in its treasury, because thousands of dollars have been collected from the abutting property holders for the improvement of the streets in question and have been paid to the Conway Company. McCormick was entitled to the profits of this contract and the City is in the position of having diverted these funds after having collected the same, from the payment of McCormick's profits, and of having paid them to one not entitled thereto.

In the Turner case the court said:

“The warrants here sued on were not issued in payment of any debt created by the City of Guthrie, but are created as legal obligations entirely by the act of the territorial legislature, and, according to the interpretation put upon that act by the Supreme Court of the United States, ‘they were claims against a municipal corporation, which have no legal obligation, but which the legislature thinks have sufficient equity

to make it proper to provide for their investigation and payment.'

"Thus it will be seen that prior to the statute these warrants would not have been of any legal effect against anybody, but were, by the statute, made an obligation against the property of residents of Guthrie proper, East Guthrie, West Guthrie and Capitol Hill, and this fact appears upon the face of each warrant. And since the statute does not impose this obligation on the City of Guthrie, and since these claims are not based upon any contract made by the City of Guthrie, no act or failure to act, on the part of any particular official, can render the City of Guthrie, as a city, liable."

It will be observed that the Supreme Court of Oklahoma clearly pointed out that the claims sued upon in that case were not based upon any contract made by the City of Guthrie, and therefore no act or failure to act on the part of any particular official could render the City of Guthrie, as a city, liable, clearly recognizing that if the claims were based upon a contract with the City, or with its officers acting for the City, and not created by an act of the legislature, that the City as a whole would be liable for the claims.

This court, speaking through Mr. Justice Peckham, in the cases of *Guthrie National Bank v. City of Guthrie*, 173 U. S. 528, 43 L. Ed. 796, had occasion to consider this act of the legislature of Oklahoma authorizing the City of Guthrie to pay the just claims against each of the villages referred to herein, and which is the same act of the legislature considered in the case of *Turner et al. v. City of Guthrie*, 73 Pac. 283.

The warrants sued upon in the Turner case expressly directed that they be paid from any moneys which should arise from special levy for the payment of city warrants issued under the act referred to upon the subdivision of Guthrie known as "East Guthrie," and in no theory of the law could the entire City of Guthrie be liable for the payment of the indebtedness, as pointed out in the opinion itself.

Then the attorneys for the appellees in this addenda cite the cases of *Board of Commissioners of Montgomery Co. v. Fuller et al.* (Ind.), 12 N. E. 298; *Little v. Board of County Commissioners of Hamilton Co.*, 7 Ind. App. 118, 34 N. E. 499, and *German American Savings Bank of Burlington, Iowa, v. City of Spokane* (Wash.), 49 Pac. 542, 38 L. R. A. 259, and then they declare that all of these cases lay down firmly that construction of street improvement is in no sense a municipal matter and that the city council in making such improvements does not act as the agent of the city, but of the property owners, and that the municipality is not answerable for loss because of the wrong of the council.

We have already pointed out that in the case of *Turner v. The City of Guthrie, supra*, the question of a contract for the paving of streets was not involved. Now, we will observe briefly the other cases referred to.

The case of *Board of Commissioners of Montgomery*

*County v. Fullen et al.*, 12 N. E. 298, was not a street paving case at all, but involved the construction of a free turnpike or gravel road. This case is cited in the opinion of the Turner case, but was referred to only as argument. Under the law of Indiana, if the first assessment should prove insufficient to pay for the improvements, the county commissioners had the power to cause a second assessment to be levied, and this is one of the questions involved in that case. The court in its opinion clearly shows that none of the issues involved in the case now under consideration were involved in the case of *County Commissioners of Montgomery County v. Fullen et al.*, because the court said:

“The questions in this case not disposed of by the decision in *Robinson v. Rippey* are these: First, has the board of commissioners authority to make an additional assessment to pay the cost of the improvement in case the original assessment proves insufficient? Second, can the board of commissioners of its own motion, and without a petition, direct the levying of an additional assessment? Third, can the board itself determine the additional amount to be assessed against the land-owners, respectively, or must it refer the matter to the viewers, as in the first instance, to determine and report the amount to be assessed as benefits?”

The question decided in the case of *Robinson v. Rippen*, 12 N. E. 141, and referred to in this opinion, was as to whether or not two separate and distinct acts of the legislature of that state could stand together where each act

provided a complete system within itself, and the court held that they could.

Mr. Justice Irwin quotes a paragraph from the case of *Board of Commissioners of Montgomery County v. Fullen, supra*, in his opinion in the Turner case, but omits a portion of a sentence which throws an entirely different light upon the paragraph quoted. There is omitted from the paragraph quoted the positive statement that "the only way in which to prevent this (the payment of the claims by the county, if the commissioners represent the county) is to hold that an additional assessment may be made when the first proves insufficient."

The case of *Little v. Board of Commissioners of Hamilton County* (Ind.), 34 Pac. 499, is also a case involving the building of a gravel road, the same as the case of *Commissioners of Montgomery County v. Fullen, supra*; but the court said in the opinion in that case:

"If this had been an act to compel the board to make an assessment, or to pay over funds already collected, a different question would be presented."

And we have pointed out that the city has been collecting the proceeds from these improvements during the last seven or eight years; probably two or three hundred thousand dollars have already been paid into the city treasury—assuming that the assessments were paid as provided under the law, the city would have received at least that sum.

Therefore, it would be in the position of having received the funds and refused to pay the same to McCormick to the extent of his profits under his contracts.

The next and last case cited in the addenda to the brief prepared by the appellees is that of *German American Savings Bank of Burlington, Iowa, v. City of Spokane* (Wash.), 49 Pac. Rep. 542. This case apparently decides that a city cannot be held liable for improvement of streets under a contract made with the city where the law provides that the improvement shall be paid for from assessments against abutting property owners, and that in no event shall the city be liable for such improvement where prohibited by positive statute; but the opinion also recognizes that if the city has collected the funds, or in any way diverted the funds, it is liable therefor. The court also says that upon the liability of cities for such improvements the authorities are divided, and Mr. Justice Dunbar most positively dissented from the doctrine and held that the city in that case was liable. The court, in the majority opinion, however, shows that the Supreme Court of Washington has been vacillating upon this subject. This opinion of *German American Savings Bank v. City of Spokane*, *supra*, was handed down by the Supreme Court of Washington July 9, 1897—eighteen years ago. But, in this opinion, the Supreme Court of Washington also recognized the right to maintain an action under circumstances similar to those involved in the instant case. In the fourth paragraph of the syllabus in that case the court said:

“Though mandamus will lie to enforce an assessment to create a fund out of which certain warrants are to be paid, a bill in equity will also lie to enforce and protect the rights of the parties.”

Therefore, McCormick having a contract with the city, he could maintain a bill in equity to compel the city to respect his rights and to enjoin it and its officers, agents and representatives from interfering with him under his contracts, and when the city deprived him of the fruits of his contract by making the improvement, the court of equity should assess the amount of damages he sustained.

Since the opinion of *German American Savings Bank v. City of Spokane*, *supra*, was handed down, the Supreme Court of Washington has also handed down the case of *Jurey v. City of Seattle*, 97 Pac. 107. That was a case where the city had diverted funds raised from local improvements, and the court recognized that wherever the city itself, through its officers, was guilty of acts *ex delicto*, it would be liable for the injury sustained by reason thereof. In this case the court said:

“The city’s liability arises from its wrongful act, and is measured by the amount of the funds misappropriated. The remedy of an injured party for a wrong of this kind would ordinarily be by an action sounding in damages for the injury suffered. \* \* \* This rule is not in accord with the statements in *German American Savings Bank v. Spokane*, 17 Wash. 315, 47 Pac. 1103, 49 Pac. 542, and other cases to the effect that an action of this kind arises *ex contractu*, and



such statements in those cases must be considered as overruled."

Thus it will be seen that the only case referred to by counsel in their addenda which tends to support their theory insofar as it conflicts with the doctrine for which we contend was expressly overruled in the case of *Jurey v. City of Seattle*, 97 Pac. 107.

The position of the appellant in this case is and always has been that McCormick had valid, binding contracts for the making of these improvements, and his rights to do the work and make the improvements were contractual. In the protection of those rights secured to him by these contracts he filed his bill in this case, asking for specific performance and for injunction, because under the contract it was contemplated that the cost of these improvements should be paid by the property owners and these payments would be made in a particular way. The bill sought to have the contract carried out and performed as agreed. The City, however, denied McCormick this right, prevented him from making the improvements, continued to refuse him this privilege or to permit him to make the improvements until after they were completed by the Conway Company. McCormick is entitled to the profits of his contracts. His failure to reap the fruits of these profits is due to the wrongful act of the City and its officers. Whatever injury he has sustained in the way of loss of these profits he may recover from the City, be-

cause the City in this regard has acted in its contractual relation and not in its legislative or governmental relations. (See *Southern Bell Telephone Co. v. City of Mobile* (Ala.), 162 Fed. Rep. 523, page 531 of opinion. Also see *City of Winona v. Bottzef*, 321, page 333 of opinion.)

The paving law of Oklahoma was taken from California, Missouri and Kansas, and in addition to this, the Civil Procedure of Oklahoma was taken from Kansas. Each of these states has adhered to the rule for which we contend in this case.

We believe valid and binding contracts were entered into between the City and McCormick, that we have established our rights to the profits of these contracts, that we have been deprived of our legal rights under the Constitution of the United States and that the City by depriving us of our rights under these contracts deprived us of our property therein without due process of law. The action of the City has been arbitrary—no reasonable excuse has ever been offered therefor. It had no right to rescind these awards and a city no more than an individual should be permitted through caprice or other improper motive to arbitrarily ignore its solemn contracts, but should be compelled to respect them, because the City should be amenable to law the same as the humblest citizen. We have examined the brief of the appellees with great care, but from our viewpoint of the facts in this case we are unable

to see any justification for the judgment of the lower court. We therefore ask that it be reversed and set aside, with directions that the trial court enter judgment in favor of McCormick and against the City of Oklahoma City as hereinabove pointed out for the amount of the profits which he lost by reason of the unwarranted action of the City in depriving him of the privilege of making the improvements under the awards made to him.

The foregoing reply brief is respectfully submitted.

B. F. BURWELL,

*Attorney and Solicitor for Appellant.*

Chief Justice Court, U. S.

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No. 170

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In the  
**Supreme Court of the United States**  
October Term, 1914

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DAVID McCORMICK, APPELLANT,

*vs.*

THE CITY OF OKLAHOMA CITY ET AL., APPELLEES

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Appeal From United States Circuit Court of Appeals  
for the Eighth Circuit.

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**BRIEF OF APPELLEES**

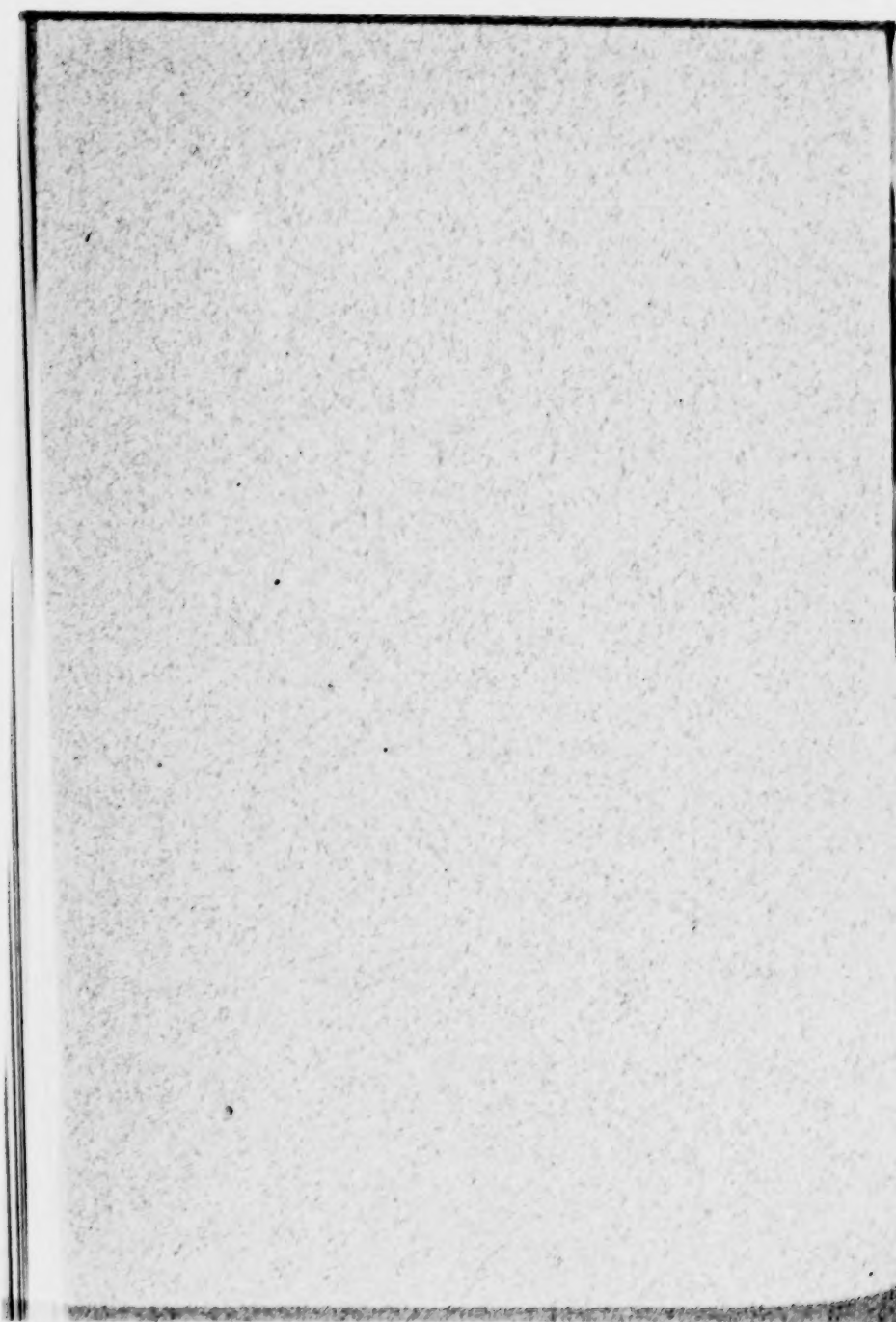
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**DAVID McCORMICK vs. THE CITY OF OKLA-  
HOMA CITY et al.**

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In the  
**Supreme Court of the United States**

**October Term, 1914**

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**No. 170**

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**DAVID McCORMICK, APPELLANT,**

*vs.*

**THE CITY OF OKLAHOMA CITY ET AL., APPELLEES**

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**Appeal From United States Circuit Court of Appeals  
for the Eighth Circuit.**

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**STATEMENT OF CASE.**

The salient facts herein, from the viewpoint of the appellees, are as follows:

The City of Oklahoma City is and has been, since a time prior to the happening of the matters complained of, a municipal corporation in the State of Oklahoma and as such has had under certain conditions authority to pave and improve its streets and alleys, including intersections, at the

cost of the adjacent property owners. The law provided for a resolution in such cases by the City Council to proceed with the improvements containing such matter as would enable the engineer to prepare the necessary plans and specifications and continued:

“Said resolution shall set forth any such reasonable terms and conditions as the mayor and council shall deem proper to impose with reference to the letting of the contract and the provisions thereof, and the mayor and council shall, by said resolution, provide that the contractor shall execute to the city a good and sufficient bond, in an amount to be stated in such resolution, conditioned for the full and faithful execution of the work and performance of the contract and for the protection of the city and all property owners interested against any loss or damage by reason of the negligence or improper execution of the work, and may require a bond in an amount to be stated in such resolution for the maintenance of good condition of such improvement for a period of not less than five years from the time of its completion, or both, in the discretion of the mayor and council.

“Said resolution shall also direct the City Clerk to advertise for sealed proposals for furnishing the materials and performing the work necessary in making such improvement. \* \* \* At the time and place specified in such notice, the mayor and council shall examine all bids received, and without unnecessary delay award the contract to the lowest and best bidder.” Section 725, Snyder’s Compiled Laws of Oklahoma.

The law also provided for an appraisalment and apportionment of the benefits and the assessments of the adjacent property therewith payable in ten annual installments and for the issuance of improvement bonds to be paid from

such assessments; that they should be sold at not less than par and "which bond or bonds shall in no event become a liability of the city issuing the same." Section 726, Snyder's Compiled Laws of Oklahoma.

October 19, 1908, the mayor and city council adopted a resolution substantially as provided by law providing for the improvement of eighteen of its streets and in said resolution was the following:

"It is further resolved that all the work done and material furnished shall be in strict conformity to the plans and specifications of the city engineer therefor and of the proper quality and tests. That the contractor to whom a contract shall be awarded for the construction of such improvements shall execute to the city a good and sufficient bond in a sum equal to 20% of the contract price conditioned for the faithful performance of the work and the execution of the contract and for the protection of the said city and all property owners against any and all loss or damage by reason of neglect or improper execution of the work and the said contractor shall also execute good and sufficient bond in the sum of 10% of the contract price conditioned for the maintenance of such work in a state of good repair for a period of not less than five years from the date of the completion and acceptance of such work.

"Be it further resolved that the city clerk of said city be and he is hereby authorized and directed to advertise for sealed bids for furnishing the materials and performing the work necessary to and for the improvement of such streets in the manner required by law, each bid to be accompanied by certified check in the sum of 3% of the amount of the bid, to be forfeited to the city in case the successful bidder fails to enter into the contract and give the required bond within the required time."

The specifications thus referred to contained the following:

"All bids for work to be performed under this contract shall be accompanied by a certified check for 3% of Bid.——Dollars (\$——), and in case of failure on the part of the successful bidder to enter into contract within twenty (20) days after notice of acceptance of such bid, said check to become the property of the City of Oklahoma City, as liquidated damages for failure to enter into such contract. Upon execution of said contract within said twenty (20) days, said check to be returned to the bidder furnishing it."

October 21 to 31, 1908, the city clerk advertised for bids on this work. In his advertisement was the following:

"Each bid must be accompanied by certified check in the sum of three per cent (3 per cent) of the amount bid, to be forfeited to the city in case the successful bidder fails to enter into a contract and give the required bond within the required time. Contractor will be required to give bond in the sum of twenty per cent (20 per cent) of the contract price, for the faithful performance of said work and the holding of the city harmless from any and all damages which might occur. Bids will be received from both a five (5) year and ten (10) year guarantee. Also the contractor will be required to give a bond in the sum of ten per cent (10 per cent) of the contract price as a guarantee of keeping the pavement in a state of good repair for a period of five (5) years if bids are accepted on a five (5) year guarantee, and in a state of good repair for a period of ten (10) years if bids are accepted on a ten (10) year guarantee. The contractor shall receive for the above work Street Improvement Bonds at par value against the abutting property according to House Bill No. 231, approved April 17, 1908.

"No proposals will be considered on any street which

does not contain a bid upon every item included in the estimate of the City Engineer for such street.

"Council reserves the right to reject any or all bids."

In response to these advertisements Mr. David McCormick, the R. F. Conway Co., and others made bids. Both McCormick and the Conway Co. bid on a five and ten year guarantee. The respective bids of McCormick upon each street concluded as follows:

"I agree to commence work within — days after signing the contract and to complete same within six months after commencement. Herewith, certified check for — (\$ —) as required.

(Signed)

DAVID MCCORMICK,

*"Contractor.*

By —, Agent."

McCormick was the lowest bidder on a ten year guarantee and the R. F. Conway Co. was the lowest bidder on a five year guarantee. At a meeting on November 4th the council by a unanimous vote rejected all bids on a five year guarantee. The council then decided to take up the bids street by street and that contracts be awarded the lowest and best bidder and adjourned to two-thirty p. m. A motion was then made to reconsider the action in the forenoon to take up the bids street by street and that contract be awarded to the lowest and best bidder and this motion was lost. Thereupon the bids were taken up street by street and as to each substantially the following appears:

"Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best

bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried."

Thereupon—

"Moved by Mr. Helm, seconded by Mr. Workman, that the action of the council in awarding contracts for asphalt paving at the meeting be rescinded. Motion lost."

On November 9, 1908, the following proceedings are recorded:

"Moved by Mr. Highley, seconded by Mr. Helm, that the council reconsider the action taken at meeting held November 4, 1908, 'in rejecting all bids for asphalt pavement based on five year guarantee.' Motion carried.

"Moved by Mr. Highley, seconded by Mr. Corder, that the council reconsider the action taken at the meeting held November 4, 1908, in awarding contracts for all asphalt paving." "

The council adjourned to November 10th and then to the 11th, when the city attorney reported that in his opinion "any time before the contracts are signed up by the city and the contractor that the council had the right to rescind its action in awarding said contracts."

Judge Burwell appeared before the council and spoke against the motion and Judge Harris spoke in favor of the same. Thereupon the motion to rescind the action taken at the meeting held November 4, 1908, in awarding contracts for all asphalt paving carried by a vote of six to four. Later Judge Burwell presented eighteen contracts of David McCormick for paving the streets formerly awarded him

and demanded that they be accepted by the council. Thereupon the council took up the bids under the five year guarantee and finding that in the aggregate the bids of the R. F. Conway Co. were some eleven thousand dollars below those of David McCormick, awarded contracts to it. The R. F. Conway Co. presented its bonds and contracts and the council ordered they be approved and accepted.

The city had a form of printed and written contract which was used both by the plaintiff and the R. F. Conway Co. in the preparation of their thirty six contracts.

These contracts contained numerous provisions not in the advertisements, plans and specifications, the bids and their acceptance. These contracts all contained the following provision:

"This contract is entered into subject to the approval or rejection of the council of the City of Oklahoma City, and it shall not bind either party until so approved and confirmed and is subject to all city ordinances now in force relating to such matters."

The plaintiff is president of the Parker-Washington Company and as such had made similar contracts with the same city to an amount exceeding two hundred and fifty thousand dollars. If he knew that such contracts would be expected he agreed thereto prior to tendering the eighteen contracts in question. If he did not understand that by his bid he was agreeing to such contracts as he knew from past experience the city would demand, then there was no meeting of the minds of the parties. If he did so understand,

he knew that the contract contained the provision that "it shall not bind either party until so approved and confirmed."

On November 16th Mr. McCormick brought suit in the State District Court for Oklahoma County against the mayor of Oklahoma City and others, and obtained a temporary restraining order. The R. F. Conway Co. were upon leave of court made defendants. December 4th a demurrer was sustained to the petition and on December 5th plaintiff was granted twenty days to file amended petition and on December 23rd fifteen days additional were granted him and on January 25, 1909, ten days additional were granted to file an amended petition. On the same day the action was dismissed but on January 27th it was reinstated and the suit was still pending after this suit was brought.

The bill sets up the facts, alleges the contract was completed between the plaintiff and the city and prays a decree of specific performance of its alleged contract, a temporary and possibly a permanent injunction and for general equitable relief.

The defendants in answer allege that all that took place between the plaintiff and parties defendant constituted only preliminary negotiations and deny there was ever any completed contract.

Upon full hearing the court dismissed the proceedings and David McCormick appealed to the United States Circuit Court of Appeals (Eighth District), where the action of the



District Court was sustained, from which decision the appellant now brings the case before this court.

Since the filing of the bill the contracts have all been completely performed by the R. F. Conway Co. and of course a decree for specific performance is now out of the question and an injunction is likewise impossible.

**Specific References to Printed Record, Supplementing Appellant's Statement of Case.**

David McCormick, a resident and citizen of the City of St. Louis and State of Missouri, was complainant below, and the City of Oklahoma City, a municipal corporation, duly organized and incorporated under the laws of the State of Oklahoma; Henry M. Scales, as the Mayor of the City of Oklahoma City; George Hess, as Clerk of the City of Oklahoma City; W. C. Burke, Engineer of the City of Oklahoma City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. F. Peshek, J. W. Johnston, C. E. McDavie, S. A. Byers and R. F. Helm as Councilmen within and for the City of Oklahoma City, each and all of whom are residents and citizens of the Western Judicial District of the State of Oklahoma, were defendants (See printed Record, pages 6 and 7), and these persons constitute the only defendants in this case. The R. F. Conway Company was not made a party to this action by the complaint nor was it made a party defendant upon its petition filed in the Circuit Court and this cause has proceeded to judgment and decree without the R. F. Conway Company

being in any manner a party to the record. As shown on page 66 of the printed record, the Conway Company asked leave to intervene as a defendant because it had a substantial interest in the result of the suit but no order was made permitting this company to intervene and it is a stranger to the record, and not bound by the decree entered herein. Therefore this suit is to determine the rights of the appellant, David McCormick, on the one hand and the City of Oklahoma City and its officers on the other. The appellant has set out the provisions of the paving law of Oklahoma and the various steps taken by the appellees necessary, under the law, to improve streets and highways and it is needless to enlarge upon that statement.

The attention of this court, however, is called to the notice to paving contractors found at page 143 of the printed record, which reads as follows:

"In accordance with a resolution passed by the Mayor and Council, October 19, 1908, sealed bids will be received at the office of Geo. Hess, City Clerk, up to 5 o'clock p. m., November 2, 1908, and will be considered by the Mayor and council at the council chamber in the city hall at 8 o'clock p. m., on said date for the paving of the following streets according to the plans and specifications now on file in the office of the City Clerk. Bids to be received on each street separately. (Then follows the description of each of the 18 streets involved in this controversy.) Each bid must be accompanied by certified check in the sum of three per cent (3 per cent) of the amount bid, to be forfeited to the city in case the successful bidder fails to enter into a contract and give the required bond within the required time. Con-

tractor will be required to give bond in the sum of twenty per cent (20 per cent) of the contract price for the faithful performance of said work and the holding of the city harmless from any and all damages which might occur. Bids will be received from both a five (5) year and ten (10) year guarantee. Also the contractor will be required to give bond in the sum of ten per cent (10 per cent) of the contract price as a guarantee of keeping the pavement in a state of good repair for a period of five (5) years if bids are accepted on a five (5) year guarantee, and in a state of good repair for a period of ten (10) years if bids are accepted on a ten (10) year guarantee. The contractor shall receive for the above work Street Improvement Bonds at par value against the abutting property according to House Bill No. 231, approved April 17th, 1908.

"No proposals will be considered on any street which does not contain a bid upon every item included in the estimate of the City Engineer for such street.

"Council reserves the right to reject any or all bids.

(SEAL)

"Geo. Hess, *City Clerk*."

Thereafter appellant submitted his sealed bids both on a five and ten year guarantee, the price of asphalt for the same being from five to seven cents per square yard higher for the ten year maintenance than for the five year maintenance. (See printed Record, pages 21 to 32.)

The concluding portion of each of said bids (See page 147 of printed Record), was as follows:

"I agree to commence work within . . . days after signing the contract and to complete same within six months after commencement. Herewith, certified check for . . . (\$ . . . .) as required.

(Signed.) DAVID McCORMICK,  
*Contractor*.

By . . . . ., Agent."

Upon the reception of the bids of various contractors the question arose before the Council with reference to the award of the contracts upon the five or ten year guarantee, and at the meeting held on November 4th, 1908, in the forenoon of that day, the motion prevailed to award the contracts to the lowest and best bidder based upon the ten year guarantee (See printed Record, page 79), and at the same meeting, or rather an adjournment of that meeting, held at 2:30 p. m. of November 9th, 1908, which meeting was adjourned from day to day until the 11th day of November, motion to reconsider the awards of November 4th was carried (See printed Record, page 89), and that the Council award contracts to the lowest and best bidder for construction of the work based on a five year guarantee. (See printed Record, page 90.) And thereupon each of the bids of R. F. Conway Company for the various streets to be paved being the lowest and best, the awards of the contracts were made to R. F. Conway Company. (See printed Record, page 91.) And on page 92 of the printed record we find the following:

“MR. PAUL: (Reading from page 270).

The contract and bond of the R. F. Conway Company were read for the paving of 11th street from west line of A. T. & S. F. Ry. to east line of Robinson; Dale avenue from north line of Park Place to south line of 13th street, Park Place from east line of Broadway to east line of Dale avenue, Oklahoma City. Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be ap-

proved and contract ordered executed. Motion carried by unanimous roll call vote except Messrs. McWilliams, McDavie and Byers voting No. That record continues from page 270 to the bottom of page 274, being the same record with reference to the other streets involved in this litigation.

MR. BURWELL: The same objection and ruling to all of it.

MR. PAUL: We now offer in evidence the eighteen contracts tendered by David McCormick to the City of Oklahoma City on the 16th of November, 1908.

MR. BURWELL: They may be admitted by agreement."

We also wish to call the attention of the court to the testimony of Geo. Hess, City Clerk, found at page 118 of the printed record, showing the manner and custom and understanding of contractors dealing with the city insofar as the intention of the parties is concerned with reference to execution of paving contracts, which reads as follows:

"Q. Mr. Hess, as City Clerk have you ever had any experience in the execution of contracts for paving?

A. Yes, sir.

Q. How many contracts have you executed of that character if you know?

A. I could not state exactly; over a hundred though.

Q. How many contracts have been executed between the city and the paving contractors during your four years as such clerk that have not been revised before written out and signed by you and the Mayor of the city?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, has no influence upon the contract in question, no defense in this action.

THE COURT: Overruled; exception noted by complainant.

A. Has not been any.

Q. Have you executed any contracts with the Parker-Washington Company or David McCormick other than formal written contracts for paving work?

A. No, sir.

Q. What is the custom of the City Council with reference to the formalities of entering into these contracts after the acceptance of bids?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, the custom of the city would be no defense in this action.

THE COURT: Overruled; exception noted by complainant.

A. The custom has been in the last four years, after the bid is accepted the city attorney is instructed to prepare a contract and the company signs or fills the necessary bonds and presents them to the Council with the contract; then if they are approved the Council instructs the Mayor and Clerk to execute them and place them on file."

We also desire to call the attention of the court to the testimony of Henry M. Seales on the same proposition found at page 123 of the printed record as follows:

"Q. What is the procedure of the City Council, the custom usually prevailing with reference to the acceptance of bids and making awards and entering into formal contracts for paving?

MR. BURWELL: Objected to for the reason the making of contracts by municipalities in Oklahoma is a matter of law, not matter of custom.

THE COURT: Overruled; exception noted by complainant.

- A. Why, advertisements for bids or proposals are inserted in a paper and at a stated or given time these proposals are opened in the open council chamber by the City Clerk; the figures are usually ready by our City Engineer as assistant to the City Clerk in that particular character of work. After reading of the bids, upon motion the contract or award is made to a certain firm or bidder; following which the City Attorney prepares a written contract which is signed by the proposer or contractor and at the next meeting of the Council, that contract coming through the Clerk's office is presented to the Council, signed by the contractor and then upon motion the Mayor and City Council are authorized to sign the contract on behalf of the city.
- Q. What is the procedure with reference to the bonds that accompany contracts for paving, with reference to their approval or rejection?
- A. They are approved also at the time the contract is entered into.
- Q. You are acquainted with Mr. McCormick?
- A. I am.
- Q. Also the Parker-Washington Company?
- A. Yes, sir.
- Q. How many contracts have been awarded to the Parker-Washington Company or Mr. McCormick during your two years in office, if you know?
- A. I could not state accurately.
- Q. Been any awarded?
- A. Yes, sir.
- Q. About how many?
- A. Oh, a half dozen at any rate.
- Q. What has been the procedure and custom with reference to the execution of formal written con-

tracts with the Parker-Washington Company or McCormick with these contracts awarded to them?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, no defense to this action; the law fixes the manner and procedure and custom would not change it.

THE COURT: Overruled; exception noted by complainant.

A. The procedure as already outlined, the same procedure I heretofore outlined. The award made at one meeting of the Council and at the next meeting of the Council is a statement of the contract signed by the Parker-Washington Company with the necessary bond and then motion to authorize the Mayor and City Clerk to enter into contract.

Q. Is that the procedure relative to the execution of the contracts in this instance, with reference to the eighteen streets?

A. What instance do you refer to?

Q. With reference to the Conway Company?

A. Yes, sir.

Thereupon the witness was excused without cross examination."

And upon the same proposition the appellant likewise testifies on page 124 of the printed record as follows:

"MR. PAUL:

Q. Mr. McCormick, you say that you are president of the Parker-Washington Company?

A. I am.

Q. You have bid on work in Oklahoma City and received contracts previous to these contracts that are in controversy here?

A. Yes, sir.



Q. For the Parker-Washington Company?

A. Yes, sir.

Q. Have you ever entered into contract with the city for paving other than by formal written contract?

A. The awards of the contracts have been followed up by written contracts.

Q. In other words, all your contracts for paving have been formally executed and signed by the parties, have they not?

A. We have signed contracts.

Q. And the city signed the contracts too, did they not?

A. Yes, sir."

It became a very important proposition in the trial of this cause as to the right of the City Council to reconsider the motions made under the rules of the City Council, particularly since it was contended that no rule had ever been adopted by the City Council relative to the business thereof. This rule was adopted as shown by the testimony of Geo. Hess, found at page 132 of the printed record, which reads as follows:

"Thereupon George Hess was recalled by the defendants for further direct examination.

By MR. PAUL:

Q. I hand you Council Journal No. 6, I wish you would turn to page 54 of that record and state what you find there with reference to the adoption of any rules of the City Council as to whether or not there are any rules of the City Council on that record?

A. Under date of April 9, 1901, rules from one to nineteen appear.

Q. Does that record show the adoption of those rules?

A. Yes, sir.

MR. PAUL: We now offer this record showing the adoption of these rules, found on pages 54, 55, 56, 57 and 58, together with the action of the City Council adopting the same.

MR. BURWELL: We object to this because the record already introduced here of date in 1902 shows that the rules were adopted at that time.

THE COURT: Have you compared them with the rules in the printed book which you have identified here?

A. I haven't read over all of them, I think they are the same; I have not proof read them.

THE COURT: Overruled; exception noted by complainant."

The said record is as follows:

"Oklahoma City, O. T., April 9, 1901.

"Mr. Paul:

"Council met as per adjournment with the Mayor and following councilmen present:

"The following rules for the government of the Council were submitted by Mr. ....: Rules No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19."

"I particularly desire to call the attention of the court and read rule No. 12 which reads as follows:

"Rule 12. A question may be reconsidered at any time during the same meeting or the first meeting thereafter. No motion shall be reconsidered more than once nor shall a vote to reconsider be reconsidered but any member of the Council who has voted in the affirmative shall have the right to move for a reconsideration."

Those nineteen rules were read by the Clerk; then this record here says:

“Moved by Mr. ....that the rules as read by the Clerk be adopted. Motion to amend by Mr. .... to strike out the last section of rule 13. Amendment lost by the following roll call vote:..... Question was put upon the original motion and carried by unanimous vote.”

Thereupon defendants rest.

It will be observed from the record also that on the 16th day of November, 1908, the appellant herein filed a suit in the District Court of Oklahoma County, for an injunction, which said suit was still pending at the time this suit was begun on January 30th, 1909. We respectfully call the attention of the court to the testimony of J. F. Havens, found at page 132 of the record as follows:

*Direct Examination by Mr. Barwell.*

“Q. Mr. Havens, you are deputy clerk of the District Court of Oklahoma County?

A. Yes, sir.

Q. I will ask you if you have examined the record in the case of *McCormick v. Scales as Mayor of Oklahoma City and Others*, No. 7968?

A. I have.

Q. Is that suit still pending in your court?

A. It is.”

*Cross Examination by Mr. Paul.*

“Q. I wish you would turn to that record of No. 7968 and tell the court what proceedings were had in that cause from that time to this.

A. Well, on November 16 there was a petition filed for injunction; restraining order granted; afterwards motion to modify restraining order filed; afterwards on December 3, demurrer to petition was filed; on December 3 there was an order of court continuing the hearing of the temporary injunction on December 4, the temporary restraining order continued in force; afterwards on the same date upon hearing of the demurrer it was sustained; December 5 the court granted plaintiff leave twenty days to file amended petition; on December 23 the court granted plaintiff leave fifteen days additional to file amended petition; on January 25, 1909, there was an order made granting the plaintiff ten days additional to file amended petition; also order on same date dismissing case at cost of plaintiff; afterwards on January 27, order of court setting aside dismissal on January 25.

Q. Is that all the proceedings?

A. Yes, sir."

After the execution of the contracts and before this suit was begun the Conway Company under and in pursuance to the terms of its contracts with the appellees, performed a large amount of work, some of the streets were completed, all of them in process of construction, and all was with the knowledge of the appellant; and upon this proposition, we invite the Court's attention to the testimony of W. C. Burke, found at pages 93 to 109 of the printed record, and which reads as follows:

"Thereupon W. C. Burke, being first duly sworn, testified on behalf of the defendant as follows:

*Direct Examination by Mr. Paul.*

Q. State your name to the court?

A. W. C. Burke.

Q. What official position do you hold in Oklahoma City?

A. City Engineer.

Q. You were City Engineer of this city during the month of November, 1908?

A. Yes, sir.

Q. Continuously up to the present time?

A. Yes, sir.

Q. Are you familiar with the streets embraced in this controversy, being eighteen streets, contracts for which were let to the Conway Company and alleged to have been let to McCormick?

A. Yes, sir.

Q. Did you prepare the plans and specifications for the construction of these streets?

A. Yes, sir.

Q. Has any work been done by any person on those streets since the 12th day of November, 1908?

A. Yes, sir.

Q. By whom?

A. By the Conway Company.

Q. Will you tell the court how much work has been done by the Conway Company on these eighteen streets up to the present time?

MR. BURWELL: Objected to as incompetent, irrelevant, and immaterial; in no way affecting the rights of the parties hereto.

THE COURT: Overruled; exception noted by plaintiff.

A. Do you want the condition of each street?

Q. Yes, if you can give that.

A. Second street from Western to Blackwelder is all completed except the asphalt.

Q. What does that mean? What work has been done?

A. That is, the asphalt surface.

Q. What work is done prior to that time?

A. Well, grading, sewers, catch basins, manholes, concrete base and curb and gutter is all in.

MR. BURWELL: I understand I am having an exception to all this testimony without interrupting and repeating my objection every time. I want it to go to all these different streets.

THE COURT: Well, state your objection.

MR. BURWELL: Counsel here objects to any evidence showing any work was performed by the Conway Company for the reason that would be no defense to this action by complainant; incompetent, irrelevant and immaterial.

THE COURT: Objection overruled; exception noted.

Q. What was the contract price of that work for that street?

MR. BURWELL: Objected to for the reason the record is the best evidence.

THE COURT: Overruled; exception noted by complainant.

A. I would have to get hold of some other documents.

Q. You haven't got it there?

A. No, I have got what it amounts to in dollars and cents when it is completed.

Q. That is what I have reference to, when completed what is the contract price of the construction of Second street from the point to the point you have indicated?

MR. BURWELL: Objected to for the reason incompetent, irrelevant, immaterial, not the best evidence.

THE COURT: Overruled; exception noted by complainant.

A. \$23,558.25.

Q. Under whose direction is that work being performed?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial.

THE COURT: Overruled; exception noted by complainant.

A. My direction.

Q. Who furnished the grading stakes and other details for the construction of this work?

A. I did.

Q. Proceed to the next street; tell the court how much work has been completed on the next street, if any?

A. Second street, from Blackwelder to Ohio, grading, sewers, catch basins, manholes, concrete base and gutter and curb is all in.

Q. What is left to be done on that street?

A. Asphalt surface.

Q. What was the total contract price for the construction of the street?

A. \$22,501.75.

MR. BURWELL: We move to strike out all the testimony with reference to Second street for the reason incompetent, irrelevant, immaterial, in no way constituting a defense to the action.

THE COURT: Overruled; exception noted by complainant.

Q. In your judgment what would be the cost to complete the work? In other words, what would be

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial.

THE COURT: Overruled; exception noted by complainant.

A. I would have to consult the plans and see the yardage in order to make an intelligent reply to that.

Q. Can you even approximate it at this time?

MR. BURWELL: We object to an approximate statement.

THE COURT: Overruled; exception noted by complainant.

A. I would say one-third of that amount would surface it.

Q. One-third of the amount for surface?

A. Yes, sir.

Q. Turn to the next street involved in this litigation and tell us what work if any has been done by the Conway Company under your direction?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, any work done by the Conway Company was done subsequent to the award of the contract to complainant.

THE COURT: Overruled; exception noted by complainant.

A. Third street from the west line of Lee avenue to the west line of Carey and Weaver's addition.

Q. What work remains to be done on that street, if any?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial.

THE COURT: Overruled; exception noted by complainant.



A. Grading, curb and gutter is in.

Q. What was the contract price?

A. \$2,362.75.

Q. How much work has been done on that contract in dollars and cents, as near as you can judge?

A. I should think about \$800.00.

Q. Turn to the next street and tell how much work if any has been performed by the Conway Company?

A. Fifth street from the west line of Walker to the east line of Western avenue.

Q. What work if any has been done on that street?

MR. BURWELL: We object to any work done by Conway Company subsequent to the awarding of the contract to complainant as no defense to this action, incompetent, immaterial.

THE COURT: Overruled; exception noted by complainant.

A. Sewer, curb and gutter and grading is completed.

Q. In dollars and cents what is that, the amount of work already done, what does it amount to?

MR. BURWELL: Same objection.

THE COURT: Overruled; exception noted by complainant.

A. The final estimate of work to be done on that street was \$24,196.00 and the amount of work done on that street is about \$7,000.00.

Q. Turn to the next street.

A. Sixth street from Robinson to Walker.

Q. What, if any, work has been performed by the Conway Company under its contract on the street?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial as to any work done subsequent to

the awarding of the contract to the complainant, no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. Grading, sewers, manholes, catch basins, and curb and gutter.

Q. What was the final estimate of the cost of that street?

A. \$11,677.00.

Q. Of that amount how much work has been performed in dollars and cents?

A. About \$3,000.00.

Q. Take the next street, give a description of the street, and tell how much work, if any, has been performed by the Conway Company?

A. Sixth street, from Walker to Lee; grading and curbing and gutter is in; final estimate amounts to \$7,590.75; there is about \$2,000.00 worth of work done.

MR. BURWELL: We move to strike out the question and answer as incompetent, irrelevant, immaterial, any work done by the Conway Company being subsequent to the award of the contract to plaintiff.

THE COURT: Overruled; exception noted by complainant.

Q. Take the next street.

A. Sixth street, from Phillips to Kelley avenue.

Q. What work has the Conway Company performed under its contract on that street? How much?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, any work done by the Conway Company no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. Grading, sewers, catch basins, manholes, curb and gutter and concrete base are in.

Q. What is the amount of work done?

A. The final estimate would be \$9,389.00, and about \$6,000.00 worth of work done.

Q. Take the next street?

A. Seventh street from Stiles to Stonewall.

Q. What work, if any, has the Conway Company done on the street and how much?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial to any work done by the Conway Company under an alleged contract awarded subsequent to plaintiff's contract, no defense to this action.

THE COURT: Overruled; exception noted by plaintiff.

A. Grading, sewers, manholes, catch basins, curb and gutter, and concrete base is in; the final estimate would be \$31,084.00 and the work completed amounts to about \$2,200.00.

Q. The next street?

A. Ninth street, from Dewey to Shartel, grading and curbing and gutter.

Q. What if any work has the Conway Company done on this street, how much in dollars and cents?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial.

THE COURT: Overruled; exception noted by complainant.

A. Grading, curbing and gutter is in; the final estimate would be \$8,388 and the amount of work done about \$2,000.

Q. What is the next street?

A. Sixteenth street from Shartel to McKinley.

Q. What if any work has the Conway Company done on that street and how much in dollars and cents?

A. Grading, sewers, catch basins, manholes, curb and gutter and concrete base; final estimate would be \$26,504.00; about \$17,000.00 worth are completed.

Q. Give us the next street?

A. Nineteenth street, from Dewey to Western.

Q. What if any work has the Conway Company done on that street, and if so, how much in dollars and cents?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, any work done by the Conway Company under an alleged contract subsequent to the awarding of the contract to complainant and no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. That street is completed.

Q. What was the final estimate of the cost?

A. \$19,703.

Q. By whom was it completed?

A. The Conway Company.

Q. Give us the next street?

A. The Classen Boulevard, from Sixteenth to Thirty-seventh street.

Q. What if any work has been done on that street, give us the amount of it?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial as to any work claimed to have been done by the Conway Company under an alleged contract subsequent to the plaintiff's contract, no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. There is part of the grading done, all of the sewers are in and part of the curb and gutter; the final estimate of that street would be \$147,498.00 and the amount of work done on that street would amount to about \$20,000.00 at the present time.

Q. Give us the next street?

A. California avenue, from Shartel to Western.

Q. What amount of work has the Conway Company put on that street and if any, how much?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial and as above.

THE COURT: Overruled; exception noted by complainant.

A. That street is completed by the Conway Company.

Q. What was the final estimate?

A. \$11,424.00.

Q. Give us the next street?

A. Eighteenth street, from Dewey to Shartel; Dewey from 17th to 19th and Lee from 17th to 19th.

Q. All that embraced in one contract?

A. Yes, sir.

Q. What if any work was done by the Conway Company on these three streets embraced in that contract, and if so, how much?

MR. BURWELL: Objected to for the reason the work claimed to be done by the Conway Company was under an alleged contract subsequent to the award of the contract to complainant and is no defense to this action, incompetent, irrelevant and immaterial.

THE COURT: Overruled; exception noted by complainant.

A. Those streets are completed by the Conway Company.

Q. What if any work has the Conway Company done on that street and how much in dollars and cents?

A. Grading, sewers, catch basins, manholes, curb and gutter and concrete base; final estimate would be \$26,504.00; about \$17,000.00 worth are completed.

Q. Give us the next street?

A. Nineteenth street, from Dewey to Western.

Q. What if any work has the Conway Company done on that street, and if so, how much in dollars and cents?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, any work done by the Conway Company under an alleged contract subsequent to the awarding of the contract to complainant and no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. That street is completed.

Q. What was the final estimate of the cost?

A. \$19,703.

Q. By whom was it completed?

A. The Conway Company.

Q. Give us the next street?

A. The Classen Boulevard, from Sixteenth to Thirty-seventh street.

Q. What if any work has been done on that street, give us the amount of it?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial as to any work claimed to have been done by the Conway Company under an alleged contract subsequent to the plaintiff's contract, no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. There is part of the grading done, all of the sewers are in and part of the curb and gutter; the final estimate of that street would be \$147,498.00 and the amount of work done on that street would amount to about \$20,000.00 at the present time.

Q. Give us the next street?

A. California avenue, from Shartel to Western.

Q. What amount of work has the Conway Company put on that street and if any, how much?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial and as above.

THE COURT: Overruled; exception noted by complainant.

A. That street is completed by the Conway Company.

Q. What was the final estimate?

A. \$11,424.00.

Q. Give us the next street?

A. Eighteenth street, from Dewey to Shartel; Dewey from 17th to 19th and Lee from 17th to 19th.

Q. All that embraced in one contract?

A. Yes, sir.

Q. What if any work was done by the Conway Company on these three streets embraced in that contract, and if so, how much?

MR. BURWELL: Objected to for the reason the work claimed to be done by the Conway Company was under an alleged contract subsequent to the award of the contract to complainant and is no defense to this action, incompetent, irrelevant and immaterial.

THE COURT: Overruled; exception noted by complainant.

A. Those streets are completed by the Conway Company.

Q. What was the final estimate of the cost?

A. \$19,487.00.

Q. Give us the next street?

A. The next street is Walker avenue from 13th to 16th.

Q. What if any work has the Conway Company done on this street? If any, how much?

MR. BURWELL: Objected to for the reason any work claimed to be done by the Conway Company was under an alleged contract subsequent to the award of the contract by the City Council to the complainant and is no defense in this case; incompetent, immaterial, irrelevant.

THE COURT: Overruled; exception noted by complainant.

A. The street is completed.

Q. What was the final estimate of the cost?

A. \$8,588.00.

Q. What was the next street?

A. Washington avenue, from Broadway to Robinson.

Q. What if any work has the Conway Company performed on that street? If any, how much?

MR. BURWELL: Objected to for the reason that work claimed to be done by the Conway Company under an alleged contract subsequent to the awarding of the contract to the complainant is no defense to this action; incompetent, irrelevant and immaterial.

THE COURT: Overruled; exception noted.

A. The street is completed.

Q. What was the final estimate of cost?

A. \$3,220.00.



Q. What is the next street?

A. Washington, from Robinson to Walker.

Q. Any work been performed by the Conway Company on that street?

MR. BURWELL: Same objection as above.

THE COURT: Overruled; exception noted by complainant.

A. Yes, sir.

Q. Is the street completed?

A. Yes, sir.

Q. What was the final estimate of cost?

A. \$11,285.00.

Q. What was the next street?

A. Phillips avenue, from 4th to 10th.

Q. What if any work has the Conway Company performed on this street?

MR. BURWELL: Objected to for the same reason.

THE COURT: Overruled; exception noted by complainant.

A. Grading, sewers, manholes, catch basins, curb and gutter and concrete base is in.

Q. What is the final estimate of the cost and how much work has been done by the Conway Company?

A. The final estimate would be \$16,334.00 and the amount of work done would be worth \$12,000.00.

Q. Any other streets now of this eighteen?

A. No, sir.

MR. BURWELL: Defendant moves to strike out all the testimony of this witness pertaining to work claimed to be done on these streets and the estimates of cost of the work already constructed, for the rea-

son if made at all it was made under a contract subsequent to the awarding of the contract to the complainant for these particular improvements, and no defense to this action; incompetent, irrelevant and immaterial.

THE COURT: Overruled; exception noted by complainant.

Q. Mr. Burke, do you know when the Conway Company commenced work, constructing these streets.

MR. BURWELL: Objected to for the reason any work done by the Conway Company was under a pretended contract entered into subsequent to the award of this contract to this complainant, and no defense to this action, incompetent, immaterial.

THE COURT: Overruled; exception noted by complainant.

A. About the 15th of November.

Q. Are they still at work?

A. Yes, sir.

Q. Do you know how many men they have employed here in the construction of this work?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. My record shows about 700 men.

Q. Know what machinery, if any, they have here in the construction of this work?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial as to any work performed under an alleged contract subsequent to the award of the contract to complainant, being no defense here.

THE COURT: Overruled; exception noted by complainant.

A. They have two large asphalt plants, three concrete mixers, three steam rollers and all the tools that naturally go with that class of work; asphalt wagons, rock wagons, teams, such things as that; of course, they hire a great many of the teams; they have some of their own, however.

Q. You are acquainted with David McCormick?

A. Yes, sir.

Q. I will ask you what if any grade stakes or other things you have given him for the purpose of constructing any of these eighteen streets?

A. None.

Q. Can you tell the court what the average daily expense of conducting this work is to the city and the Conway Company?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial and no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. The labor account is approximately about \$2,000 a day, I should judge, and the amount of material they use daily in the way of rock, sand, cement, asphalt, I think about \$1,800 or \$2,000 worth of material a day.

Q. You, of course, inspect all the material they use in the construction of these streets?

A. Yes, sir.

Q. Are you familiar with the amount of material the Conway Company has on hand at this time for the purpose of constructing these streets?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial and no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. I believe they have enough material on hand to complete all these contracts.

Q. In dollars and cents what would that amount to; in your best judgment, of course?

A. You are speaking now of the material on hand?

Q. Yes, sir.

A. I would say \$40,000.00.

Q. What effect does the incomplete condition of these streets you have testified concerning have upon the travel with reference to being open or closed for travel?

A. Well, when we turn a street over to the contractor he has possession of that street and he is responsible for it.

Q. During the process of construction are these streets open for travel?

A. No, sir; they are barricaded.

Q. Were they very much traveled streets or otherwise, those that are closed at this time?

MR. BURWELL: Objected to as calling for conclusion, not statement of fact.

THE COURT: Overruled; exception noted.

A. Oh, they are all traveled more or less, some of them more than others.

*Cross Examination by Mr. Burwell.*

Q. Mr. Burke, you say that you never furnished any grade stakes to David McCormick for the doing of any of this work, on any of these eighteen streets. Mr. McCormick told you he wanted grade stakes and expected to carry out his contract, didn't he?

A. No, sir.

Q. Did he never talk to you about grade stakes or things of that kind?

A. No, sir.

Q. You are sure of that?

A. Yes, sir; I am sure of it.

Q. Were you present in the City Engineer's office when Mr. McCormick personally spoke to those in charge with reference to grade stakes?

A. No, sir.

Q. You were not?

A. No, sir.

Q. You don't say that was not done, but you don't know of it?

MR. CHAMBERS: We object to that.

THE COURT: Overruled.

A. I could not answer what he said to others; I said he didn't say it to me.

Q. You say there are about seven hundred men at work at this time on these streets?

A. Yes, sir.

Q. If the work were to cease they would be relieved from employment and the Conway Company would not suffer by reason of having to pay these men?

MR. PAUL: We object to asking for conclusion, not statement of fact.

THE COURT: Sustained.

Q. Are you acquainted with the custom of construction companies with reference to whether or not they pay their employees when not actually employed on the work?

A. There is lots of them that are paid regularly, whether employed or not.

Q. Are the ordinary laborers paid?

MR. PAUL: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Overruled; exception noted by defendant.

A. Some of them are; it depends on circumstances. Now, I cannot testify from absolute personal knowledge in this particular case, but before there was any litigation or any question about expense or anything like that came up, I was informed by the Conway Company manager or superintendent that a certain number of the men he brought from Chicago which he calls his experts at their particular vocation; they get regular full time whether they work or not.

Q. How many of those are there employed at this time?

A. I should judge of that class there is possibly one third of this concrete force.

Q. How many are there on the concrete forces?

A. I think about 75 or 80 men on the three gangs.

Q. And one-third would be about twenty-five men?

A. Yes, sir.

Q. What do all these other men do?

A. Now at the asphalt plant, there are quite a number of men there that are monthly men, in fact, hired men about all the time, so I am informed.

Q. You don't know about that?

A. No, sir; so I am informed. Understand now, I don't know to my own personal knowledge that how these other men are paid except what I have been told about it.

Q. You do know and isn't it a fact that these construction companies doing paving work hire quite a number of other men who when laid off do not receive pay?

- A. Yes, sir.
- Q. Now, the material which is consumed upon the work from day to day that would not be lost, that would not be lost, that would keep—
- A. They have lots of that material delivered on these different streets in advance of the machines.
- Q. How long in advance?
- A. Sometimes a couple of weeks.
- Q. Well, that is gravel?
- A. That is rock and sand.
- Q. That would not be destroyed by delay?
- A. Well, to a certain extent. They might be to the cost of taking it off again.
- Q. But the material itself would not be destroyed by any delay?
- A. It depends on how much it was delayed. You take a sand pile and let it stand there six months, there would not be any sand there then.
- Q. It could be removed all right?
- A. It might have laid there, but not any six months.
- Q. That is a fact. It was removed immediately after stopping work?
- A. Yes, sir.
- Q. You say they have their appliances here for doing paving work, they have other contracts amounting to over \$300,000 in this city, the Conway Company, at this time beside these eighteen contracts?
- A. They have their contracts; yes, sir.
- Q. You are furnishing grade stakes for those?
- A. Yes, sir.
- Q. This entire force could be employed upon that improvement?

A. A great many of those streets are open.

Q. A great many are not open?

A. Some that are not.

(A) They receive something like \$500,000 (work) of work other than involved here?

A. \$400,000.

Q. That work has not been commenced?

A. Has not been started; no, sir.

Q. Then there was something over \$200,000 in addition to that they received about the same time they begun work on these particular contracts, in fact before that?

A. Yes, sir; their contract—that is the first contract there is no question about, I think amounted to \$225,000.

Q. This entire force which they have could be used on these streets that are not completed if this work was stopped, couldn't they?

A. No, sir.

Q. Could not be?

A. No, sir.

Q. Why?

A. You could not put them on there, would not be room to put them all on. In the first place, you have got to grade the street then you follow it up with sewers, then follow the concrete with your asphalt. Now, if they open up the new contracts, the first thing they would do would be to put on the grading—utilize the grading forces.

Q. Let me ask you this: if they were to cease work on these eighteen contracts they could change on to other work without any difficulty, except they would be required to discharge some of the men



in their employ, cut down some of the force, isn't that true?

A. They would have to reduce their force; yes, sir.

Q. But they could go right ahead and complete these contracts; that would be the only trouble?

A. I want to make that clear. Now, quite a large per cent of all the streets now in controversy, in fact 90 per cent of the streets now in controversy, are already completed or just ready for asphalt, so that the only forces that could work on the streets that are now in controversy would be simply the asphalt forces.

Q. You are not including in that the \$40,000 contract awarded the other night?

A. No, sir.

Q. At the time these contracts were awarded to David McCormick by the City Council, he had all appliances and machinery here to go ahead and do this work, didn't he?

A. No, sir.

Q. Didn't he have an asphalt plant?

A. Yes, sir; he had an asphalt plant.

Q. He had other machinery here?

A. No, sir.

Q. Didn't he have shovels?

A. He might have had a few shovels or picks?

Q. And tools, picks, all that sort of things?

A. No, sir; I say he didn't have them here. He finished the Eighth street paving in October and he had to borrow some tools in order to finish that.

Q. At the time these contracts were awarded to David McCormick, isn't it a fact he had more machinery

and plants here to do that work than the Conway Company people had?

A. The Conway people didn't have any at that time.

Q. None at that time?

Q. Didn't have until after this whole matter was disposed of by the City Council?

A. No.

Q. Didn't have until after suit was filed in the District Court to enjoin them from doing that work?

A. It was some time about the first of December when they got their outfit here, that is all their appliances that go with the paving work.

Q. You remember the meeting of the City Council at which Mr. Burwell appeared and addressed the City Council, protesting against the reconsidering of the David McCormick award, do you not?

A. Yes, sir.

Q. He knew all about the claim of Mr. McCormick, he had a contract for the paving of these streets?

MR. PAUL: Objected to as incompetent, irrelevant, immaterial, asking for conclusion; the record is the best evidence.

THE COURT: Sustained.

Q. Isn't it a fact that McCarthy was present in the council chamber that evening and heard all these proceedings?

A. He was in the council room that evening; whether he was there at that particular time when you addressed the council I could not say for certain.

Q. He was there about the council chamber all evening?

A. Yes, sir.

Q. Would it have been possible for him to have been in and out of the council chamber that evening

and not have known this matter was being considered?

MR. PAUL: Objected to as incompetent, immaterial.

THE COURT: Overruled.

A. That is rather a hard question to answer. I was there very busy at the time; I could not tell who was in the council chamber.

Q. I asked the question if it would have been possible for him to be in and out of that council chamber that evening and not know this matter was being considered there?

A. I don't think there was any question but what he knew there was a controversy about this paving, and you addressed the council. I don't think there could be any question about that.

Q. I was claiming the award was to David McCormick?

A. Yes, sir.

Q. During that time and before the award made to David McCormick was reconsidered by the council, did you talk with Mr. McCarthy about it?

A. Yes, sir; I talked to everybody, talked to Mr. McCormick, Mr. Kind, Mr. McCarthy, Mr. Bell.

Q. Did you talk with Mr. McCarthy as to whether the award to McCormick constituted a contract for that work?

MR. PAUL: Objected to as incompetent, irrelevant, immaterial.

THE COURT: Overruled; exception noted by defendant.

A. I don't know that I did; I have no recollection of it.

Q. You say you were present in the council chamber when Mr. Burwell addressed the council; he appeared there on two different occasions, didn't he?

A. I believe he did.

Q. Did you hear Mr. Burwell state to the Mayor and the council, or the President of the council, as the case might be, whoever was in charge of the City Council—the City Council was in regular session at that time, was it not?

A. Yes, sir.

Q. Did you hear Mr. Burwell state to the Mayor and council on that occasion that he had there eighteen contracts for these particular improvements and demanded that they be executed by the Mayor on behalf of the city and the proper officers of the city, and if they were not in form, they would make them complete and file plans and specifications if they were awarded the contracts by the council?

MR. PAUL: We object to that as incompetent, irrelevant, immaterial; the record is the best evidence.

THE COURT: Overruled.

A. I don't remember; I think they did, though.

Q. I will ask you to refresh your memory and see if you don't remember that?

A. There was so much said and occupied so much time there, it is pretty hard to remember what was said. It seems to me I have a vague recollection you did mention about having the contracts ready to tender and asked that they be executed.

Q. Didn't Mr. Burwell on that occasion or on a subsequent occasion, state to the Mayor and council that Mr. McCormick would insist on these awards and would take such legal measures as would be necessary to protect his interests?

A. Yes, sir; I heard that.

Q. That occurred while the council was in regular session?

A. Yes, sir.

*Redirect Examination by Mr. Paul.*

Q. At the time these contracts were awarded, did Mr. McCormick have a plant here for the purpose of finishing up some work or was the plant idle?

A. It was idle.

Q. How long had it been idle?

A. I think from the middle of October.

Q. It was still idle?

A. Yes, sir.

Q. Do you know to whom the plant belongs?

A. Supposed to belong to the Parker-Washington Company.

MR. BURWELL: Objected to as incompetent, immaterial, conclusion of witness.

THE COURT: Sustained.

Q. Do you know of your own knowledge to whom that plant belongs?

A. No, sir.

Q. Do you know by whom it was used in the work on Eighth street?

A. By the Parker-Washington Paving Company.

Q. Know what if any signs or statements appear on that plant as to the ownership of it?

A. The name of Parker-Washington appears on the side of the plant.

Q. Mr. McCormick was president of the Parker-Washington Company?

A. Yes, sir.

Q. These bids were made by him in his individual name, were they not?

A. In the name of David McCormick; yes, sir.

- Q. At the time that Judge Burwell appeared before the council, was it not after the council had reconsidered its action in awarding the contracts on a ten year basis and determined to award them to the lowest bidder on a five year basis?
- A. That was the time; it was at that meeting.
- Q. After you had reported that the Conway Company was the lowest on five year guaranty?
- A. Well, the proceedings in the council were about as follows: After the council convened and by motion adopted the five year guaranty, then motion was made to award the contract to the lowest and best bidder on the five year guaranty; I was called upon then to give the figures and I read the streets in their regular order, and the question would be asked, as I read from——Second street from the west line of Western to the east line of Blackwelder; Conway, \$22,276; McCormick, \$23,080; Barber, \$24,140; I would announce that the Conway Company was the low bidder; then motion would be made to award the contract to Conway for the particular street; then vote would follow.
- Q. After that was done, Judge Burwell, as I understand you, appeared there and tendered the contracts to the city and made the announcement he proposed to carry out the terms of the contract?
- A. He appeared then, but whether he tendered the contracts prior to the reading or close after, I am not prepared to say.

*Re-Cross Examination by Mr. Burwell.*

- Q. Isn't it a fact that Mr. Burwell appeared there before the council before those bids were read for reconsideration and protested against the council—reconsidering the award of David McCormick?
- A. It was at that meeting.
- Q. Did Mr. Burwell appear before the motion to reconsider the award was voted upon or afterwards?

- A. I could not say.
- Q. I will ask you to refresh your memory and see if you cannot recollect that Mr. Burwell addressed the council protesting against the reconsideration of that bid and that Mr. Harris urged its reconsideration before the awards were made to the Conway people?
- A. Well, I don't remember; I think you did; I think it was prior to the actual awarding.
- Q. Then after they reconsidered it and voted to reject the ten year bids, then it was that they adopted the five year bids and you read those streets and those were then awarded to the other persons?
- A. I cannot recollect the exact procedure when the council convened.
- Q. The record has already been introduced upon that?
- A. Yes, sir; I would rather rely upon the record. I think it was at that meeting you addressed the council, but exactly at what point in the meeting you addressed them, I am not clear, yet I think it was prior to the awarding.
- Q. Prior to the time of the reconsideration of this bid, Mr. Burwell stated to the council that David McCormick would pursue whatever legal remedies he had to enforce his rights?
- A. It was at that meeting, but exactly what time you addressed them or made that statement to the council, I am not prepared to say.
- Q. To refresh your memory, don't you remember that these proceedings were all had and then while you were reading the streets and the City Council were passing upon them, that Mr. Burwell, and the other persons who had addressed the council, retired from the council chamber and you finished the awarding these contracts, the second award, after they had left the council chamber?

A. That may be true; yes, sir.

Q. To refresh your memory—

A. I am testifying exactly what I believe—it was at that meeting, but as to what time of the state of the meeting, I am not prepared to say; I wasn't interested in any way.

Q. You say you did report at the former meetings that McCormick was the lowest bidder on all these eighteen awards?

MR. PAUL: We object to that, the record is the best evidence.

THE COURT: Overruled.

A. When the award was made on the ten year guaranty, I read off all just in the same manner in which I read these.

Q. And the awards were made upon that basis?

A. Whoever was low man on the ten year basis was read to the council and award was made in that manner.

Q. You say the Parker-Washington machinery is idle at the present time?

A. Yes, sir.

Q. The Parker-Washington Company was the low bidder on these \$40,000 worth of work awarded a few days ago, wasn't it?

MR. PAUL: Objected to as incompetent, immaterial.  
(Question withdrawn by counsel.)

*Re-Direct Examination by Mr. Paul.*

Q. Do you remember when this law suit was tried here in the District Court on the 3rd day of December?

A. Yes, sir.



Q. Have you seen Mr. McCormick from that day to this?

A. Yes, sir.

Q. Frequently or otherwise?

A. A couple of times, I think.

Q. Do you know of your own knowledge whether he knew the Conway Company was at work on these streets?

A. I don't see how he could help know it.

MR. BURWELL: Move to strike out the answer.

THE COURT: Overruled; exception noted by complainant.

Thereupon the witness was excused."

We likewise desire to call the attention of the Court to the specifications prepared by the engineer and adopted by the Mayor and City Council with reference to the execution of the contract, found at page 51 of the printed record, which reads as follows:

"All bids for work to be performed under this contract shall be accompanied by a certified check for 3 per cent of bid———dollars (\$——), and in case of failure on the part of the successful bidder to enter into contract within twenty (20) days after notice of acceptance of such bid, said check to become the property of the City of Oklahoma City, as liquidated damages for failure to enter into such contract. Upon execution of said contract within said twenty (20) days, said check to be returned to the bidder furnishing it.

"The said first party will be required to furnish, at the time of entering into contract for the work herein described, an approved bond, to the said second party, in

the sum of 20 per cent of contract (\$——), for the faithful performance of the work, as herein specified, and within the specified time.”

The attention of the court is also directed to certain proceedings of the City Council, relative to the transaction involved in this case.

See printed record, page 79, for extracts from record of city council journal, No. 12.

“Moved by Mr. Byers, seconded by Mr. McWilliams, that the council reject all bids for asphalt paving based on five year guarantee. Motion carried by unanimous roll call vote.

“Moved by Mr. Byers, seconded by Mr. McWilliams, that all bids of J. F. Hill for paving of the different streets as per advertisement for bids, ending at 5 o'clock p. m., November 2, 1908, be rejected and not considered as samples of materials to be used submitted by him were not in accordance with the specifications of the City Engineer for this work. Motion carried by unanimous roll call vote.

“Moved by Mr. Helm, seconded by Mr. Land, that all bids for asphalt paving be rejected and the clerk instructed to re-advertise for bids for this work.

“Moved by Mr. McDavie, seconded by Mr. McWilliams, as a substitute for Mr. Helm's motion that the bids for asphalt paving be taken up street by street and contracts awarded to the lowest and best bidder.

“Substitution motion carried by roll call vote.”

**“Minutes of Meeting of City Council Nov. 5 (4), 1908,  
Awarding Contracts for Paving Certain Streets to  
David McCormick.**

(See printed Record, page 79.)

“Oklahoma City, Okla., November 4, 1908.

“Council met in adjourned session at 2:30 p. m. with Mayor and following members present: Highley, Workman, Helm, Peshek, Johnston, McWilliams, McDavie. Land and Byers came in later.

“Moved by Mr. Workman, seconded by Mr. Helm, that council reconsider action taken at meeting held in forenoon of this date ‘that the bids for asphalt paving be taken up street by street and contracts awarded to the lowest and best bidders.’ Motion lost by the following roll call vote: Ayes: Workman, Helm. Nays: Highley, Peshek, Johnston, McWilliams, McDavie and Byers. City Engineer Burke reported that the bid of David McCormick was the lowest and best for the paving of Second street from the west line of Western avenue to the north line of Blackwelder Avenue, Oklahoma City, Okla.

“The bids were as follows:

“DAVID MCCORMICK.

Asphalt paving inc. 5" Portland C. Con.	
Found. 10y. Guar. per sq. yd.....	2.10
Earth excavation per cu. yd.....	.35
Concrete curb. and Gut. Str. 6" curb. per lin.	
ft. ....	.75
Concrete curb. and Gut. rad. 6" curb per	
lin. ft. ....	.75
Concrete double gutter, per lin. ft.....	.75
3" oak header per lin. ft.....	.15
Vit. pipe in place with backfill, per lin. ft. 10"	
60c; 12" 80c; 18" 1.55; 21" 1.75; 15" ..	1.00
Manholes complete at .....	40.00
Catch basins at .....	20.00
Approx. total .....	\$23558.25
R. F. Conway total.....	23574.00

“Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Peshek, Johnston, McWilliams, and McDavie; Nays: Messrs. Workman, Helm and Land.”

**“Minutes of Meeting of City Council Nov. 9, 1908.**

(See printed record, page 89.)

“Oklahoma City, Oklahoma, November 9, 1908.

“Moved by Mr. Highley, seconded by Mr. Helm, that the council reconsider the action taken at meeting held November 4, 1908, ‘in rejecting all bids for asphalt pavement based on five year guarantee.’ Motion carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Peshek, Johnston and Land. Nays: McWilliams, McDavie and Byers. Moved by Mr. Highley, seconded by Mr. Corder, that the council reconsider the action taken at the meeting held November 4, 1908, in awarding contracts for all asphalt paving.

“Moved by Mr. Land, seconded by Mr. McWilliams, that the council adjourn to meet at 10 o'clock a. m., November 10, 1908, to give City Attorney Taylor an opportunity to investigate the law in regard to the legality of above motion of Mr. Highley. Motion carried.

**“EXHIBIT II.”**

**“Minutes of Meeting of City Council Nov. 10, 1908.**

(See printed record, page 90.)

“We now offer in evidence extracts from council proceedings as found in council record No. 12 at page 250, under date of November 10, 1908:

“Oklahoma City, Okla., November 10, 1908.

“Council met in adjourned session at 11 o'clock a. m., with the Mayor and following members present: Messrs. Highley, Workman, Helm, Corder, Peshek, McWilliams, McDavie, Land and Byers.

“Moved by Mr. McDavie, seconded by Mr. Peshek, that the council adjourn to meet November 11, 1908, at 8 o'clock p. m., to give the City Attorney further time in which to investigate the law in regard to Mr. Highley's motion to reconsider the awarding of contracts for asphalt paving. Motion carried.

“EXHIBIT I.”

“Minutes of Meeting of City Council Nov. 11, 1908.

(See printed record, page 90.)

“We now offer in evidence extract from council proceedings found in council record No. 12 at page 251, under date of November 11, 1908:

“Oklahoma City, Okla., November 11, 1908.

“Council met in adjourned session with the following members present: Messrs. Highley, Workman, Helm, Corder, Peshek, McWilliams, McDavie, Land, Byers, and Johnston; Mayor being absent, Mont F. Highley, President of the Council and Acting Mayor, presided.

“City Attorney Taylor gave verbal opinion in regard to motion of Mr. Highley made at meeting of council November 9, 1908, ‘That the council reconsider action taken at meeting held November 4, 1908, in awarding contracts for asphalt paving.’ His opinion was that any time before the contracts are signed up by the city and the contractor that the council had the right to rescind its action in awarding said contracts. Motion by Mr. McWilliams, seconded

by Mr. Helm, that the opinion of the City Attorney be received and placed on file. Motion carried. (There being no opinion of the City Attorney to place on file, the only record of such opinion is the statement as above written.—Clerk.)

“Judge Burwell appeared before the council and spoke against the motion and Judge Harris spoke in favor of the same.

“Motion as made by Mr. Highley, as stated above, carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Johnston, Land. Nays: Messrs. Peshek, McWilliams, McDavie and Byers.

“I offer in evidence also extract from council proceedings found in Council Record No. 12, at page 269:

“Moved by Mr. McWilliams, seconded by Mr. Byers, that Judge Burwell be granted permission to address the council. Motion carried.

“Judge Burwell presented the eighteen contracts of David McCormick for paving different streets and demanded that they be accepted by the council.”

### **Testimony of Defendants.**

Thereupon the defendants introduced the following testimony (See printed record, page 91):

“MR. PAUL: The defendants offer in evidence extract from the proceedings of the City Council of Oklahoma City, found in Council Journal No. 12, at page 251, commencing where Judge Burwell left off:

“Moved by Mr. Byers, seconded by Mr. McWilliams, that the council do not consider any bids for asphalt paving to be let at this time based on the five year guaranty. Moved by Mr. Helm, seconded by Mr. Corder, as a sub-

stitute for Mr. Byers' motion that the council proceed to award contracts to the lowest and best bidder for asphalt paving based on the five year guaranty. Substitute motion carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Peshek, Johnston, Land. Nays: Messrs. McWilliams, McDavie and Byers.

City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best bid for the paving of Second street from W. line of Western Ave. to E. line of Blackwelder Ave., Oklahoma City, Okla. The bids were as follows:

Sh. Asphalt Pav. inc. 5" Portland C. Con.	
Found. 5 yr. Guar. per sq. yd.....	\$ 1.95
Earth excavation per cu. yd.....	.35
Str. Concrete curb and gut. 6" curb per lin. ft. ....	.70
Red. Concrete curb and gut. 6" curb per lin. ft. ....	.75
3" Oak header per lin. ft.....	.15
Vit. pipe in place with back fill per lin. ft. 10" 60c; 12" 80c; 18" 1.55; 21" 1.75; 15" ..	1.00
Manholes complete, each.....	40.00
Catch basins at.....	20.00
Approx. total .....	\$22,276.25
David McCormick total.....	23,080.50
Barber Asp. Co.....	24,140.25

Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co., being the lowest and best, that their bid be accepted and they be awarded the contract for paving the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Peshek, Johnston, Land and Byers. Nays: Messrs. McWilliams and McDavie.

MR. BURWELL: We object to the introduction of that

because incompetent, irrelevant and immaterial and in no way affecting the contract with complainant.

THE COURT: Well, that is the question in the case; your objection can be noted and I will receive the evidence.

MR. BURWELL: Will your honor receive it subject to ruling upon it after investigation?

THE COURT: Certainly.

MR. PAUL: Without taking the time of the court to read all this, I will at this time state that the same record is made on each of the eighteen streets, paving contracts awarded to R. F. Conway, pages 251 and 265, inclusive. We offer these in evidence.

MR. PAUL: We also offer in evidence extract of council proceeding found in Council Journal No. 12, at page 270.

MR. BURWELL: We also wish to object to the introduction of this evidence on page 270 because it pertains to the purported contract for the same work to David McCormick.

THE COURT: Overruled.

Exception noted by complainant.

MR. PAUL (reading from page 270): "The contract and bond of the R. F. Conway Co. were read for the paving of Eleventh Street from west line of A., T. & S. F. Railway to east line of Robinson; Dale Avenue from north line of Park Place to south line of Thirteenth Street. Park Place from east line of Broadway to east line of Dale Avenue, Oklahoma City. Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting No.'"



### PROPOSITIONS OF LAW.

Upon the part of the appellee the record herein discloses the following conclusions:

#### FIRST.

*If appellant had such a contract as that he was entitled to relief, it was his duty, knowing that the city was simply charged with the burden of letting contracts for such improvements, and that it, in no event, was to become liable for the cost thereof, to have promptly proceeded to protect his rights by injunction or mandamus. He could not lie by for near unto three months, as was done in this case, and after the rights of others had intervened, then ask from the general taxpayer the profits which he might have made if he had been permitted to perform the contract.*

#### SECOND.

*Although the appellant may have been entitled to the contracts in controversy; and, though his bid were wrongfully rejected, he has no right of action against the city, at law nor in equity, to recover the profits which he might have made had his bid been accepted. He did not suffer any injury, directly, by reason of the act of the council,*

*though he may have lost the profits which he might have made. Such losses were not direct, but were speculative, consequential and problematical, and they were one of the risks which a bidder must assume in attempting to deal with a municipality, performing such character of governmental functions.*

THIRD.

*That, under the reserved right to reject any or all bids, and the rules of the council permitting a reconsideration, at the same or a subsequent meeting; and considering the events from the viewpoint that the Mayor and council were performing only governmental functions, and not ministerial duties, then at the time they exercised it, they were possessed of the power to reject any class of bids, or the appellant's bid in particular, if in their judgment and discretion they considered it best; and, appellant treated with the city possessing a knowledge of this power and cannot now complain of its exercise.*

FOURTH.

*In the letting of municipal contracts, the officers of a municipality perform not merely ministerial duties, but duties of a judicial and discretionary nature, and the courts*

*in the absence of fraud or a palpable abuse of the discretion vested in the officers have no power to control their action. In the case at bar, in the letting of the contracts which occasioned this controversy, the city was performing no proprietary functions, whatsoever, but was exercising a delegated governmental power, in the doing of which its officers were called upon to exercise judgment and discretion; and as no fraud is alleged, or shown, their action, in deciding which bid was the best bid to be accepted, was final, and was not the subject of review by any court.*

FIFTH.

*We insist that although there had been substantial agreement, the parties each recognized something remaining to be done to complete its execution; and that so long as this condition continued to exist, that there was not the meeting of minds necessary to constitute a completed contract. And, that under such a state of facts the Mayor and council in the exercise of their judgment and discretion still retained the right to reconsider and reject the appellant's bid; and, in so doing, they acted within their governmental powers, and their judgment of what was best to be done is not subject to review in the absence of a showing of fraud.*

SIXTH.

*The conduct of the appellant in having his attorney prepare formal written contracts, and the offering of them to the City Council for acceptance, and to be signed, contradicts appellant's contention that such formal contracts were not contemplated and the offer and acceptance not conditional upon the execution of final written contracts. Such action is conclusive that appellant knew that something more was contemplated by the parties than the bid and acceptance upon the minutes of the council; and when appellant prepared and signed the formal written contracts it was an admission that he did not regard the bid and acceptance as a completed contract; and if it was not such completed contract, then he is not entitled to maintain this action.*

SEVENTH.

*Where a city, on advertising for bids for a municipal improvement, both in the specifications and in the advertisement, reserved the right to reject any or all bids, and stated that the successful bidder must enter into a written contract to perform the work, and complainant knew from past experience, in executing similar contracts with said city, that he would be required to enter into a written contract,*

according to an adopted form, in case his bid was accepted,  
and in his bid he provided that he would commence the  
work within a given time after signing the contract, a mere  
vote of the City Council to accept one of complainant's bids  
and to award a contract to him which was thereafter recon-  
sidered, no written contract ever having been executed, was  
insufficient to show the execution of a contract for the work  
between the city and complainant pursuant to his bid.

## ARGUMENT.

### Appellant Guilty of Laches.

#### FIRST PROPOSITION.

*If appellant had such a contract as that he was entitled to relief, it was his duty, knowing that the city was simply charged with the burden of letting contracts for such improvements, and that it in no event was to become liable for the cost thereof, to have promptly proceeded to protect his rights by injunction or mandamus. He could not lie by for near onto three months, as was done in this case, and after the rights of others had intervened, then ask from the general taxpayer the profits which he might have made if he had been permitted to perform the contract.*

In the specifications under which appellant offered his bid (see printed record, page 44), appears the following language:

“The doing of the work embraced in the contract shall not render the city liable to pay directly or indirectly for said work or any part thereof, otherwise than by levy or special assessment, and issuance of certificates against the lots, tracts and parcels of land liable to be charged therefor, as provided by law, and that said contractor shall be without recourse or liability against the city of Oklahoma City in any event.”

In Section 17 of his Bill of Complaint (see page 36 of the printed record), appellant quotes the above language of the specifications, and charges that it was the agreement, and the law, that in no event would the city become liable;

and in Section 19 of said Bill of Complaint, upon the same page of the record, appellant says:

"The expenses of paving the public streets of cities is taxed to the property owners in front of whose property the paving is laid and improvements made; that the city is not liable for the costs of such pavement. \* \* \*

Under such a state of facts appellant was fully aware, in contracting with the city officials, that in so doing they were acting wholly within their governmental functions, and that he must look solely for his compensation, if any accrued to him, to the proceeds of the special assessment as provided by the paving law.

He permitted the work to be proceeded with by another contractor, under a different kind of contract, to a point where injunction no longer availed him anything, and that contractor's right had accrued against the property owners by the actual performance of the work, and then he comes into this Court and asks that the general taxpayers of the city be forced to respond in damages to compensate him for his speculative profits.

Appellant surely slept upon whatever rights he may have had, and now has no just claim upon equity—to assist him in mulching speculative profits from the general taxpayer, who had no interest in the transaction, and whom the specifications provided, and the law said, in no event were to become liable.

The appellant cited numerous authorities upon the proposition that where, pending the consideration of a bill

in equity the party places it beyond the power of the court to do equity, the court will still retain the case and award damages nevertheless. We recognize the rule particularly in injunction cases and suits for specific performance of contracts, that where a court of equity once assumes jurisdiction and the guilty party places it beyond the power of the court to render a decree in equity, that the bill will not be dismissed, but the court will retain jurisdiction and award damages to the injured party. Appellant has not placed himself in position in this case, from all the evidence, as well as the law of the case, to invoke this doctrine and ask damages in this action as a result.

Necessarily the court below, upon its finding of fact that no contract existed between the parties, could do nothing else than render judgment against appellant and of necessity could not retain jurisdiction to award damages when there was no contract upon which damages could be given to the appellant, whether the city placed him in a position of being unable to carry out the work of improvement or not. Therefore, before the appellant could ask for damages in this case, he must show that a completed contract existed between the parties, and that such damages had accrued as would entitle appellant to a recovery. Has the appellant shown that he comes within the rule laid down by courts of equity, viz.: that he must come into court with clean hands and seek to do equity as well as demand it?



The contracts and bonds of the Conway Company were approved on the 16th day of November, 1908, and not until the 30th day of January, 1909, about two and one-half months after the contracts were awarded and approved, after the Conway Company had spent many thousand dollars in the performance of their contracts, some of the streets actually completed, others nearly so, and a vast number of employees at work, plants and machinery brought from a distance, and on the ground, operations under the contracts so awarded them in full blast, all with the positive knowledge of the appellant, who sat idly by and permitted this company to go about in the performance of its work and expenditure of its money, under contracts that were at least colorably valid, without a word of protest in this Court, and after December 4th, 1908, no effort made in the state court to prevent the inference by others in the performance of appellant's alleged contract, strikes us that the appellant does not come into this Court of equity entitled to the relief which he is seeking.

We maintain that he is guilty of laches. Whether a party is guilty of laches depends upon the circumstances of each case. The appellant in this case is seeking relief in the nature of specific performance of the contract, or in lieu thereof, damages. Yet, he has permitted all this work to go on without protecting his rights. Is he guilty of laches? Upon that proposition we desire to cite the court to the following authorities:

26 Am. & Eng. Ency. of Law, 2 Ed., 77.

*McCabe v. Mathews*, 155 U. S. 550, 39 Law Ed. 256.

*White v. Wansey et al.*, 116 Fed. 345.

*Dalzell v. The Deubar Watch Case Mfg. Co.*,  
149 U. S. 315.

*Hennessey v. Woolworth*, 128 U. S. 442.

**Appellant Suffered no Injury—Damages Claimed are Speculative.**

**SECOND PROPOSITION.**

*Although the appellant may have been entitled to the contracts in controversy; and, though his bid were wrongfully rejected, he has no right of action against the city, at law nor in equity, to recover the profits which he might have made had his bid been accepted. He did not suffer any injury, directly, by reason of the act of the council, though he may have lost the profits which he might have made. Such losses were not direct, but were speculative, consequential and problematical, and they were one of the risks which a bidder must assume in attempting to deal with a municipality, performing such character of governmental functions.*

Though a city charter requires contracts to be let to the lowest bidder, the lowest bidder under the contract proposed to be let by it, whose bid has been rejected, has no right of action at law against the city to recover the profits which might have been made had his bid been accepted. In such case the plaintiff did not suffer any injury directly by reason of the act of the council, though he

may have lost the profits which he might have made, yet such losses are not direct but consequential and it is no part of the object of the statute to prevent losses of that kind. Appellant should have proceeded by injunction or mandamus, and in such manner adjudicated his rights to a contract, if any he had. He could not lie by, and, after the work had been done, or partly done, ask for profits which he might have made if he had been permitted to perform the contract.

The case of *Strong v. Campbell*, 11 Barb. 135 (N. Y.) was one in which a postmaster was sued by the publisher of a newspaper for failure, under a certain statute, to accept his bid for publishing a list of uncalled for letters, and the publisher alleged that he was thereby deprived of the profits and advantage which would otherwise have accrued to him from the printing of said list.

In the course of the opinion the court said:

"To give a right of action for such a cause, the plaintiff must show that the defendant owed a duty to him personally. Whenever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental and no part of the design of the statute, no right to created as forms the subject of an action. In this I apprehend all authorities will be found to agree."

Citing:

*Martin v. Mayor & C. of Brooklyn*, 1 Hill 545.

*Bank of Rome v. Mott*, 17 Wend. 556, 19 Vin.  
ab. 518, 520, 1 Salk 19.

*Ashby v. White*, 6 Mod. 51.

"In the latter case Holt, Chief Justice, laid down the rule that it must be shown that the party had a right *vested* in him, in order to maintain the action. And this I apprehend is the true rule. It must be an absolute vested right or interest in contradistinction to one incidental and contingent."

Further the court said:

"Now for whose benefit was the act of congress under consideration passed, and the instructions of the postmaster general given? Not surely that publishers of newspapers might be enabled to obtain profitable employment, and receive emoluments from the public treasury. That was no part of the design of the lawmakers. The design of the law obviously was, first, to benefit persons securing communications through the post office, by giving the widest possible notice that letters remained on hand ready for delivery; and secondly, to secure the greatest amount of revenue to the department by the delivery of letters and the receipt of postage thereon which might otherwise never be called for, and consequently be returned to the dead letter office. These plaintiffs had no direct interest in the observance of the law, and the regulations of the department, except as they received letters at this office. \* \* \* But it is clear, I think, that these plaintiffs, as publishers of a newspaper, in which character they claim, had no such interest as gives a right of action. As connected with their paper they were not within the purview of the statute, except incidentally. \* \* \* They might make a profit by the performance of the duty, but they sustain no loss by non-performance."

In the case of *Palmer v. Inhabitants of Haverhill*, 98 Mass. 487, a case in which the selectmen of a village rejected a lowest bid for the building of a sewer, in passing upon the right of the bidder to damages, the court said:

"The plaintiff's final claim is that the town is at least bound to repay him for the money expended and labor performed in making estimates. There is certainly no evidence of any express promise to do so. And we are aware of no principle of law by which such a promise is implied under circumstances like the present. An obligation to pay an unsuccessful bidder for his time and trouble in making proposals would be extraordinary. The inducement to make such bids is the hope that they will be accepted, and a profitable contract thereby obtained. If the town is bound to pay this plaintiff, so it would also have been to pay every one else who entered proposals, however many bidders there might have been."

It will be noted that in the case just cited the claim for damages was limited to the actual expense which the bidder had already been put to and this was denied, while in the case at bar the appellant is seeking to recover his imagined profits and must indulge the realms of speculation to measure them.

In the case of *Talbot Pav. Co. v. City of Detroit*, 109 Mich. 657, 67 N. W. 979, 63 Amer. St. Rep. 604, it was held:

"Though a city charter requires contracts to be let to the lowest bidder, the lowest bidder under a contract proposed to be let by it, whose bid has been rejected, has no right of action at law against the city to recover the profits which might have been made had his bid been accepted."

This was a case very similar in respect to demand

made for relief to the one at bar, being an action by the Talbot Paving Company against the City of Detroit to recover damages alleged to have been sustained by plaintiff by reason of the refusal of defendant's city council to let to it a contract for paving for which it was the lowest bidder. There was judgment entered on a verdict directed by the court in favor of defendant, and plaintiff brings error.

“It was settled in the mandamus proceeding (*Talbot Pav. Co. v. Common Council of City of Detroit*, 91 Mich. 262, 51 N. W. 932) that the objection made by the respondent was purely technical and without foundation, and that justly, if not legally, the plaintiff may have been entitled to have its contract approved, as the respondent had made no change in the plans or specifications of the work and was proceeding to make a contract under its original resolution; but as the contract had been already let, and the work done, no relief could be granted by the writ of mandamus. The question was left open whether, under the circumstances shown, the relator had a right of action for its damages. The proposition here is whether the lowest bidder, under a contract proposed to be let by a municipal corporation whose bid had been rejected, has a right of action at law to recover profits which he might have made had his bid been accepted.

“While it is true that there are many cases in which an injunction has been ordered because of the rejection of the lowest bid, and acceptance of a higher bid, under the same notice of letting the contract (*Times Pub. Co. v. City of Everett* [Wash.], 37 Pac. 695, and cases there cited), yet we find no cases, except as referred to hereafter, where a party has been permitted under such circumstances to bring and maintain an action at law for loss of profits. There are also cases which hold that the local assessment is void

if the contract is not awarded to the lowest bidder. *Twiss v. City of Port Huron*, 63 Mich. 528, 30 N. W. 177. While, under the charter of Detroit, it was the duty of the city to let the contract to the lowest responsible bidder, yet this charter provision was not passed for the benefit of the bidder, but as a protection to the public. We think the rule as stated in *Strong v. Campbell*, 11 Barb. 138, is the true one and the one which has always been adhered to by the courts. It is there stated as follows: 'Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting by its performance is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action.' The learned judge writing the opinion in that case cites, in support of this rule, the cases of *Bank v. Mott*, 17 Wend. 556; *Martin v. Mayor, etc.*, 1 Hill 545; 19 Vin. Abr. 518, 1 Salk 19; *Ashby v. White*, 6 Mod. 51. The court in *Strong v. Campbell, supra*, said: 'It is unquestionably the duty of every officer to perform every duty imposed upon him by law in the manner and to the extent prescribed, and he may be punished for every violation to the injury of the public or that of individuals. But it does not follow that some one has a right of action against him for every neglect or violation of duty to recover private damages.'

"Mr. Justice Selden, in the case of *Trustees of the Village of Plattsburg*, 16 N. Y. 161, note, filed an opinion written by him in the case of *Weet v. Trustees of the Village of Brockport*, which was adopted by the court as decisive of the *Plattsburg* case. The learned justice reviews at great length the various cases, both English and American, upon the subject. He says: 'We see from the two classes of cases that there is an important distinction between the obligations as-

sumed by private individuals for a consideration received from the government or sovereign power of the state and those assumed by public officers. \* \* \* The reason for the distinction appears to be that intimated by Gould, J., in *Lane v. Cotton*, 1 Ld. Raym. 646, viz.: that the duties in the one case are imposed upon the officer for public purposes only, while in the other they are voluntarily assumed with a view to private advantage. The cases which have been cited show that, in respect to this distinction, corporations have been placed upon the same footing as private individuals.' Continuing, Mr. Justice Sehlen says that he has been able to find only one case in this country or in England opposed to those views, and that is the case of *Adsit v. Brady*, 4 Hill 630.

"In view of this rule, what is the position of the City of Detroit towards the plaintiff? It owed no duty to the plaintiff. The charter provisions which required the acceptance of the lowest responsible bid had no reference to any interest which the bidders might have in the premises, but was passed to protect the interest of the citizens of the city. Though the act accepting the second bid may have been against the interest of the citizens, certainly the plaintiff could have no action to redress that wrong and injury. It may have been, and evidently was, under the facts shown, a neglect of duty, and the plaintiff undoubtedly was injured by it. The case of *Adsit v. Brady*, *supra*, was decided upon the theory that, when a public officer acts or omits to act contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of his case. But, as we have seen, that rule is not sustained, except in cases where the act performed or omitted to be performed was with a view to some private advantage. But, it is contended, this rule would be a great burden upon the public, and lead to great frauds in municipal affairs. It may be said in answer to this proposition: First, that the public are not here complaining; and, second, that the plaintiff is not in a position to take advantage of the act, as the charter was not adopted for its individual



benefit. Again, it is apparent that, if frauds may be perpetrated in that way, there is a remedy by injunction to prevent the making of a contract with the next highest bidder. We are of the opinion that the plaintiff cannot sustain this action."

Equally strong does the argument of the learned judge in the Michigan case apply to the issues in the case at bar, and it seems to us to be upon all fours and conclusive in this action.

**Council Performed Governmental Functions and Had the Power to Reject Bids.**

**THIRD PROPOSITION.**

*That, under the reserved right to reject any or all bids, and the rules of the council permitting a reconsideration at the same or a subsequent meeting; and, considering the events from the viewpoint that the Mayor and council were performing only governmental function and not ministerial duties, then at the time they exercised it they were possessed of the power to reject any class of bids, or the appellant's bid in particular, if in their judgment and discretion they considered it best; and, appellant treated with the city possessing a knowledge of this power and cannot now complain of its exercise.*

Much has been said in appellant's brief about there being no essential difference between the contracts offered by appellant and the ones entered into by the city with the Conway Company. As most of the provisions of all

contracts of this class are, from long usage and custom, largely formal, this, in a way, appears to be correct.

However, in one most important essential there is a very great difference; a difference in fact which makes these two contracts entirely dissimilar.

Upon page 164 of the printed record (last paragraph), it will be observed that McCormick offered to agree to keep the improvements in good repair for the full period of ten (10) years from and after the acceptance of the same by the city; and, in the last paragraph of page 171, of said record, it will be seen that the contract with the Conway Company, which was accepted, reduced the period of maintenance to five (5) years.

A calculation of the difference in ultimate costs to the property owners shows that this change resulted in a very great reduction in cost, and this saving constitutes the essential difference between the two contracts, and was, in fact, the moving cause for rejecting the ten year bids, and with them the McCormick bids, and in accepting the less expensive five year bids resulting in the Conway Company receiving the contracts.

Why did the City Council call for two different kinds of bids, if it did not retain within itself the right to consider and accept or reject the class which appeared in their discretion to be for the best interest of the property owners? And, if such right was retained when was it to be no longer available?

Surely a governmental body, delegated for public purposes, with the judgment and discretion to think and act for the best interests of the property owners, who are forced to pay the bills, was not bound by a "spur-of-the-moment" vote to accept the ten year bids; and to be thus prevented, within the limits of a reasonable time, and within its rules, from thereafter ascertaining and adjudging that the five year bids were the most economical, and, therefore, proceeding to accept them as the best bids.

In doing this the Council did not specifically reject appellant's bid, but it did reconsider its previous motion to accept the ten year bids, and in so doing appellant's bid, for that class of contracts, was no longer available. Upon the Council concluding to adopt the class of bids calling for a five year guarantee, all the bids for such latter class of work were considered, and the bids of the Conway Company, upon their face, were seen and adjudged to be the lowest and best bids.

No contention is made that the bids of the Conway Company, upon the five year guarantee, were not the lower in cost and therefore they were properly adjudged to be the lowest and best bids.

*Therefore, the real contention of the appellant in this case is not that his bids were rejected, because such rejection was simply an incident to the determination of the Council to accept five year guarantee, in lieu of its first decision, to accept those of a ten year duration—but that the City Council had no right to reconsider its action in*

*deciding to accept the ten year bids.* Such a decision upon the part of the Council was in its nature judicial, and was the clear exercise of the delegated discretion bestowed upon it by the state legislature.

One of the purposes of the legislature in delegating this discretion to the Council was that it was believed that the men occupying the positions of Councilmen were capable of passing upon just this sort of questions.

And one of the purposes of the Council by following a fixed custom and in provisions in its notices to bidders, and in its specifications, and in its contract form, calling for a written contract, was that this judicial power and discretion should be retained until a final, definite and formal contract should be concluded.

Appellant would not directly contend for a moment before the court that he had a right to make the improvements in controversy, under a five year guarantee, for the price bid for a ten year maintenance. But this indirectly is what he does contend for. He did not have the low bid under the class of bids which were finally accepted, and so his real complaint is, not that his bid was rejected, but that he was not given the contract under a class of bids where another had, beyond question, submitted the lowest bid.

Appellant in no place argues that in deciding to reject the ten year bids, and to accept the five year class, that the

Council did not act within its province, and such was what it did, and all it did, in this case.

The rules of the City Council provided that the Council may reconsider any action taken by it at either the same meeting or at the next succeeding meeting thereafter. The reconsideration in this case took place at the next meeting of the Council, all intermediate meetings having been adjournments taken from the regular meeting. This rule is authorized by the provisions of the Oklahoma Statute, found in Snyder's Compiled Laws, 1909, Sec. 664, which gives the Council the right to make all corporate rules to carry its corporal powers into effect. This proposition is generally recognized by the courts and we will not burden this court with authorities upon the proposition, contenting ourselves to cite to the court in support of that power, McQuillin's Municipal Ordinances, Sec. 115, and authorities cited in note 39.

Also:

*Higgins v. Curtis*, 39 Kan. 283; 18 Pac. 307.  
*Masters v. McHolland*, 12 Kan. 17.

Each adjournment had from the 4th day of November to the next regular meeting at which the award was finally reconsidered, was but a continuance of the regular meeting and while counsel for appellant do not raise any issue upon this question we nevertheless desire to cite this court to the following authorities in support of that proposition:

McQuillin's Municipal Ordinances, Sec. 112 and  
note 32.

*Rutherford v. Hamilton*, 11 S. W. 249.  
*Magneau v. Freemont*, 9 L. R. A. 786.  
*Hubbard v. Winsor*, 15 Mich. 146.  
*Carter v. McFarland*, 75 Ia. 196.  
*State v. Van Osdell*, 15 L. R. A. 832.  
*Sackett v. State*, 74 Ind. 486.  
*Cut Camp v. Utt*, 144 N. W. 214.

Reconsideration may be taken at any time prior to a final conclusion and acceptance and before any vested right has been incurred.

McQuillin's Municipal Ordinances, Sec. 121.

We take it that the argument found in the brief of the appellant in reference to the matter of reconsideration of the award, to the appellant, was void, is not supported by any authority submitted. We have called the attention of the court in this brief to the authorities cited and they do not, in any manner, support the proposition cited by the appellant.

We desire to call the attention of the court to the following authorities authorizing the Council to reconsider the action taken by it at any time before a vested right has accrued.

*State v. Foster*, 7 N. J. Law 101.  
*Jersey City v. State*, 30 N. J. Law 521.  
Dillon Municipal Corporations, 5 Ed. Sec. 539;  
and authority cited.  
*Platter v. Board*, 2 N. E. 544.

We maintain that the appellant failed to show by any evidence that the acceptance of his bid was communicated

to him so as to bind either party as a contract. The appellant admits that no notice was ever given to him of the acceptance of his proposal, yet, in the brief and by the record he attempts to justify this contract by what he regards as a custom prevailing among bidders and contractors, that no notice of acceptance was ever given but that it was the duty of the contractor to ascertain whether or not the Council had awarded the contract to him, thereby recognizing, as he must, the proposition that before a contract is deemed to be executed in law based upon the foundation of proposals, it is necessary that notice of acceptance thereof should be conveyed to the proposer.

It is as unfounded and as contrary to the requirements of the law for appellant to say that he was in public meeting of the Council when this action was taken awarding to him contract, as that he read the same in the newspaper report of the Council proceedings the next day or the next week. Certain formalities of the law are required and the appellant is as much bound to observe the same whether he were present and heard the proceedings, or whether he gained knowledge through some other means.

The question is, was legal notice given of the acceptance of his proposal, so that before the same was given, might he have withdrawn his offer and thereby have escaped the execution of the contract that might have been injurious to him, as might the city, upon the reconsideration, determine not to enter into the contract previously awarded to

him. In other words, is there mutuality of contract by the proceedings had? Would the mere fact that if it had been the custom of this contractor, the appellant, and various other contractors, to act with the city in violation of the law, make lawful that which the law has declared in express terms as unlawful?

The law of contracts is well defined in the Statutes of Oklahoma, Sections 1059 to 1066, Snyder's Compiled Laws, 1909, read as follows:

"Sec. 1060. **MUTUAL CONSENT DEFINED.** Consent is not mutual unless the parties all agree upon the same thing in the same sense. But in certain cases, defined by the Article (111) on interpretation they are to be deemed so to agree without regard to the fact. (S. 1890, Sec. 818.)

"Sec. 1061. **How COMMUNICATED.** Consent can be communicated with effect, only by some act or omission of the party contracting, by which he intends to communicate it, or which necessarily tends to such communication. (S. 1890, Sec. 819.)

"Sec. 1062. **SPECIAL MODE OF ACCEPTANCE.** If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted. (S. 1890, Sec. 820.)

"Sec. 1063. **TRANSMISSION OF CONSENT BEGUN.** Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section. (S. 1890, Sec. 821.)

"Sec. 1065. **ACTS WHICH ARE AN ACCEPTANCE.** Performance of the conditions of a proposal, or the accept-



ance of the consideration offered with a proposal, is an acceptance of the proposal. (S. 1980, Sec. 822.)

“Sec. 1065. ACCEPTANCE MUST BE ABSOLUTE. An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character, which the proposer can separate from the rest, and which will include the person accepting. A qualified acceptance is a new proposal. (S. 1890, Sec. 823.)

“Sec. 1066. REVOCATION OF PROPOSAL. A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards. (S. 1890, Sec. 824.)”

In the case of *Dunham v. The City of Boston*, 12 Allen 375, the court says:

“The court are of opinion that the evidence does not prove that the defendants contracted with the plaintiff for the sale of the land to him. The vote passed on the 11th of August does not import a contract, even when approved by the Mayor. It was not communicated to the plaintiff as a contract, and it does not appear that it was intended to be so. On the contrary, it was to be communicated to the proper officers of the city as an authority to them to execute a deed, and it contemplates the deed as the only contract which the city was to make with the plaintiff. It was thus a mere preliminary to the completion of the contract.”

See also:

*Gennis v. Mount Hope Iron Co.*, 53 Me. 20, 9

A. R. A. 117, 13 S. C. 94.

*Beckwith v. Cheever*, 21 N. H. 41.

*Duncan v. Heller*, 13 S. C. 94.

In the case of *Sears v. Kings County Elevated R. Co.*, 9 L. R. A. 117, it is held:

“To make a vote of a corporation a contract which

will be binding on it, the obligation which it undertakes to assume must be offered to, and accepted by, the intended beneficiary.

"In the action of an officer of a corporation to recover salary which is alleged to have been fixed by a vote of the Board of Directors, parol evidence is admissible to show that the vote was never communicated to or accepted by the plaintiff, and for this purpose proof of the circumstances attending the transaction may be given."

**Letting of These Contracts Were Governmental Functions,  
Beyond the Control of the Courts, Except Upon a  
Showing of Fraud.**

FOURTH PROPOSITION.

*In the letting of municipal contracts the officers of a municipality perform not merely ministerial duties, but duties of a judicial and discretionary nature, and the courts in the absence of fraud or a palpable abuse of the discretion vested in the officers have no power to control their action. In the case at bar, in the letting of the contracts which occasioned this controversy, the city was performing no proprietary functions whatsoever, but was exercising a delegated governmental power, in the doing of which its officers were called upon to exercise judgment and discretion; and as no fraud is alleged, or shown, their action, in deciding which bid was the best bid to be accepted, was final, and was not the subject of review by any court.*

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The Supreme Court of the Jurisdiction of Oklahoma, when the latter was a Territory, in an unanimous opinion, concurred in by the learned counsel for the appellant, when he was sitting as a member of that bench, has accepted and adopted the identical principles contended for by the appellees in this case, and applied them in the case of *Turner et al. v. City of Guthrie*, 13 Okla. 26, 73 Pac. 283.

In that case the Territorial Supreme Court cited with approval:

*Board of Commissioners of Montgomery Co. v. Fullen et al.* (Ind. Sup.), 12 N. E. 298.

*Little v. Board of County Commissioners of Hamilton Co.*, 7 Ind. App. 118, 34 N. E. 499.

*German-American Savings Bank of Burlington, Iowa, v. City of Spokane* (Wash.), 49 Pac. 542, 38 L. R. A. 259.

In all of these cases the rule in substance is laid down firmly that construction of street improvements is in no sense a municipal matter; that the city council in so doing is not acting as the agent of the city, but of the property owners, by virtue of an express statute conferring that power upon them, and it is held that the municipality is not answerable for loss because of the errors, negligence or wrong-doing of the council.

In the body of the Oklahoma case the court said:

"It cannot be said that the mayor and council were required by the Legislature to act as the agents of the City of Guthrie, according to the provisions of the act, and because the Legislature named the mayor and city council of the City of Guthrie as the instruments to carry out a portion of the provisions of the act, cannot make the City of Guthrie liable for a failure on the part of such officials to act."

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In the letting of municipal contracts the officers of a municipality perform not merely ministerial duties, but duties of a judicial and discretionary nature, and the courts,

in the absence of fraud or a palpable abuse of the discretion vested in the officers, have no power to control their action.

*Inge v. Board of Public Works*, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20.

*Stanley-Taylor Co. v. San Francisco*, 135 Cal. 486, 67 Pac. 783.

*Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114.

*Keogh v. Wilmington*, 4 Del. Ch. 491.

*Downing v. Ross*, 1 App. Cas. 251.

*Kelly v. Chicago*, 62 Ill. 279.

*People v. Kent*, 160 Ill. 655, 43 N. E. 760.

*Louisville Steam Forge Co. v. Gast*, 115 S. W. 761.

*Kelley v. Baltimore*, 53 Md. 134.

*Madison v. Harbor Board*, 76 Md. 395, 25 Atl. 337.

*Detroit Free Press Co. v. State Auditors*, 47 Mich. 135, 10 N. W. 171.

*Detroit v. Circuit Judge*, 79 Mich. 384, 44 N. W. 622.

*State v. McGrath*, 91 Mo. 386, 3 S. W. 846.

*State v. Saline County*, 19 Neb. 258, 27 N. W. 122.

*Scheffbauer v. Township Committee*, 57 N. J. L. 588, 33 Atl. 454.

*Van Reipen v. Jersey City*, 58 N. J. L. 262, 33 Atl. 740.

*Murray v. Bayonne*, 73 N. J. L. 313, 63 Atl. 81.

*Terrell v. Strong*, 14 Misc. 258, 35 N. Y. S. 1000.

*Holley v. New York*, 128 App. Div. 499, 112 N. Y. S. 797.

*State v. Shelby County*, 36 Ohio St. 326.

*State v. Hermann*, 63 Ohio St. 440, 59 N. E. 104.

*Plessner v. Pray*, 8 Ohio Dec. 149.

*State v. Columbus*, 9 Ohio Dec. 336.

*State v. St. Bernard*, 4 Ohio Cir. Dec. 224, 10 Ohio Cir. Ct. 74.

*Hubbard v. Sandusky*, 6 Ohio Cir. Ct. Dec. 786.

*Wiggans v. Philadelphia*, 2 Brews. 444.

*Com. v. Guardians of Poor*, 13 W. N. C. 61.

*Com. v. Mitchell*, 82 Pa. St. 349.

*Findley v. Pittsburg*, 82 Pa. St. 351.

*Douglass v. Com.*, 108 Pa. St. 559.

*Carpenter v. Yeardon*, 208 Pa. St. 396, 57 Atl. 837.

*McCain*, 9 S. D. 57, 68 N. W. 163.

*Brown v. Houston*, 48 S. W. 760.

*State v. Milligan*, 3 Wash. 144, 28 Pac. 369.

Where the awarding of a contract for a public improvement has been committed to a board of public works, in the absence of fraud or collusion its decision is final and conclusive, and cannot be controlled by the courts by mandamus or otherwise.

*Maryland Pavement Co. v. Mahool et al.*, 110 Md. 397.

In the body of this decision the court said:

“Yet the authorities are uniform in holding that in determining who is the lowest responsible bidder the municipal authorities have a wide discretion, which will not be controlled by the courts except for arbitrary exercise, collusion or fraud, and they need not be guided in their determination solely by the question of the pecuniary responsibility of a bidder, but may consider his ability to respond to the requirements of a contract and his general qualifications to properly execute the work.”

Citing:

28th Cyc. 1031.

*Keogh v. Wilmington*, 4 Del. Ch. 491.

*Madison v. Harbor Board*, 76 Md. 395, 25 Atl. 337.

Further in its opinion the court said:

“The better doctrine, however, as to all cases of this nature and one which has the support of an almost uniform current of authority is that the duties of officers intrusted with the letting of contracts for public improvements to the lowest bidder are not duties of a strictly ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond the control of the courts by mandamus.”

Citing:

*Davin v. Belt*, 70 Md. 354, 17 Atl. 375.

*Baltimore, etc., v. Latrobe*, 81 Md. 246, 31 Atl. 788.

*Henkel v. Millard*, 97 Md. 30, 54 Atl. 657.

*Baltimore v. Flack*, 104 Md. 143, 64 Atl. 702.

28th Cyc. 663.

20th Am. & Eng. Enc. of Law (2nd Ed.) 1169.

In *Scheffbauer v. Township Committee*, 57 N. J. L. 588, 31 Atl. 454, wherein the power of the courts was discussed at length, the court said:

“The objection of the prosecutors to the action of the township committee in the award of the contract is that it was not awarded to the lowest bidder. There can be no force in this objection. In the exercise of the power conferred upon them in this matter, they were not required to award the contract to the lowest bidder. The authority to enter into this contract was a general one, and not limited and restrained in any manner in this respect, and if they exercised the power in good faith,

in a bona fide manner, without abuse or corruption, then the court cannot interfere with the exercise of their judgment in the matter. They were not to exercise an arbitrary discretion, and over such an exercise of power the court would have ample control in order to defeat fraud or injustice, and to protect the public from the abuse of the power conferred, and from extortion and imposition. But if they exercised the power conferred upon a substantial and rational basis of fact, in good faith, in a bona fide manner, then the discretion or judgment, whichever the act may be called cannot be interfered with by the court. The legislative power to make this contract was conferred upon this body and not upon the court. They exercised the power, and whilst it may have been exercised in a different manner, or with a different discretion, from that which the court would have exercised, that alone furnishes no ground for nullifying their action. The power to be exercised, and the restraints of it, are matters of legislative jurisdiction. The abuse of the power, contrary to common justice, becomes cognizable in the courts for correction."

In *Keogh v. Wilmington*, 4 Del. Ch. 491, the court stated what it understood to be the precise limit of judicial interference with the discretionary powers of municipal corporations, in the following language:

"The courts may interpose so far as to protect private rights when violated or threatened by the action of these bodies, also to restrain them from the assumption of powers not granted by their charters, and further, to guard the public interests against any corrupt or fraudulent abuse of the powers granted to them. But where no private right is infringed and the city corporation or its officers are exercising their discretion in good faith, the court will not revise the grounds of their action is inexpedient for the public interest."



The New Orleans city charter requires that the furnishing of materials for public works shall be given to the lowest bidder, but there was a proviso that the council may reject any and all bids. *Held*, that the City Council was vested with a certain discretion in rejecting bids, which would not be controlled by the courts when exercised with prudence in the public interest.

*Ganning Gravel & Paving Co. v. City of New Orleans*, 45 La. Ann. 911, 13 South 182.

Sustaining this rule is:

*State ex rel. Irondale Chert Paving & Improvement Co. v. City of New Orleans*, 48 La. Ann. 643, 19 South. 690.

Until final action has been taken by a city council on proposals for street improvements, a contract for such improvements is incomplete, and may be defeated by the refusal of the body to proceed further.

*South v. City of New York*, 10 N. Y. (6 Seld) 504. Affirming: 6 N. Y. Super. Ct. (4 Sandf.) 221.

To same effect is:

*Terrell v. Strong* (Sup.), 14 Misc. Rep. 258, 35 N. Y. Supp. 1000.

Also:

*Palmer v. Inhabitants of Haverhill*, 98 Mass. 478.

The discretion vested in the Commissioner of Public Works of Chicago to determine who are the lowest re-

sponsible bidders on contracts for public improvements cannot be controlled by the courts, in the absence of fraud.

*People v. Kent*, 160 Ill. 655, 43 N. E. 760.

See also:

*General v. City of Detroit*, 22 Mich. 262.

*Clopton v. Taylor*, 49 Mo. App. 117.

*Talbot Paving Co. v. City of Detroit*, 109 Mich. 657, 67 N. W. 939, 63 Amer. St. Rep. 604.

*Starkey v. City of Minneapolis*, 19 Minn. 203 (Gil. 166).

*Elliott v. City of Minneapolis et al.*, 59 Minn. 111, 60 N. W. 1081.

In the case of *Mann v. Town of Rochester*, 63 N. E. 874, 29 Ind. App. 12, it was held that where the trustees of a town of under 5000 inhabitants advertised for bids for work in the construction of waterworks, and accepted a bid, such action constitutes no contract between the bidder and the town, but the making of a contract remains discretionary with the trustees until a written contract is executed by them.

In this last named case the bid was accepted without equivocation and caused to be entered of record the following: "Mann & Andrew of Dowagiac, Mich., was awarded the contract for laying the pipe, etc.," and in pursuance of said award the board directed its attorney to prepare a contract for said work and to forward the same to the contractors, which he did, and they received the contract, signed it and procured a bond conforming to the requirements and conditions of the letting of the work, which bond was executed

by the American Surety Co. of New York City, the same were mailed back to the appellees and received by them; and the appellants proceeded at great expense to prepare to carry out the provisions of the contract. In the body of the opinion the court said:

"His right is not fixed by the ascertainment that he is the lowest bidder. Great latitude of discretion is given to the board of trustees, and, if in their opinion he cannot be depended upon to do the work with ability, promptness and fidelity, they may give the contract to next lowest bidder or decline to contract and readvertise. They are not limited in this regard until they have actually contracted. There was nothing in the published notice for bids to authorize an inference of a proposal to regard the announcement of the lowest bid and the award of the contract to the lowest bidder as final without the subsequent execution of a contract by the town."

In that case the court held that the use of the words in instructing their attorney "to prepare a contract for such work, and forward the same to" the appellants. And that it did not appear that the board executed the contract or dictated its provisions or had knowledge even of the contents of the instrument, and that in instructing the attorney to prepare "a contract" did not make the city a party to the contract.

And further the court said:

"But until the agents of the public corporation have exhausted their official discretion confided to them by law in the interest of the portion of the public represented by them, the corporation is not irrevocably committed as a contracting party. In the matter of con-

struction of water works to be owned and managed by the city under the statutes above quoted, the municipality is under the protection of the discretionary authority of the official representatives, honestly exercised in its behalf, up to the final execution of the contract by them, and is entitled to receive through them the benefit of the exercise of their best judgment, based upon all information acquired by them, until their discretionary power is exhausted by the execution of the contract."

Further it said:

"It is the manifest meaning of the statute that the contract provided thereby shall be a contract in writing and it sufficiently appears to have been the purpose of the parties that the terms agreed upon by them should be reduced to writing, and should be signed by them before the contract would be considered as completely made; and where such is the case, especially where one of the parties be acting in a public capacity, all that goes before such completion must be regarded as negotiations for a contract or steps leading to a contract."

Citing:

*Commissioners v. Brown*, 32 N. J. Law 504.

*People's R. Co. v. Memphis R. Co.*, 10 Wall. 38,  
19th Law Ed. 844.

*Dunham v. City of Boston*, 12 Allen 375.

*Edge Moor Bridge Works v. Bristol Co.*, 170  
Mass. 528, 49 N. E. 918.

### **Did the Parties Enter Into an Enforceable Contract?**

#### **FIFTH PROPOSITION.**

*We insist that although there had been substantial agreement the parties each recognized something remaining to be done to complete its execution; and that so long as this condition continued to exist, that there was not the meeting*

of minds necessary to constitute a completed contract. And, that under such a state of facts the Mayor and council in the exercise of their judgment and discretion still retained the right to reconsider and reject the appellant's bid; and, in so doing, they acted within their governmental powers, and their judgment of what was best to be done is not subject to review in the absence of a showing of fraud.

On this proposition we desire to call the attention of this Court to the case of *State ex rel. Cleveland Trinidad Paving Company v. Board of Public Service of Columbus*, 90 N. E. 389. This case was begun by the relator to compel the city of Columbus to enter into a contract for the paving of Third Avenue in the city of Columbus. On the 2nd day of October, 1906, the council passed an ordinance to proceed with the improvement and directed the Board of Public Service to advertise for bids and enter into a contract for the paving of this street.

The board did so advertise, which advertisement among other things provided that each bid should be accompanied by a certified check, conditioned that the contract should be entered into within five days after notification of acceptance from the board. The relator was the lowest bidder and on February 16th, 1907, the board adopted a resolution finding that the relator was the lowest and best bidder and ordered the contract be entered into for the improvement, upon the giving of a satisfactory bond within five days from that date, and the clerk was ordered to trans-

mit a copy of the resolution, but later the board by resolution set aside its previous action and readvertised for bids. The relator demanded execution of the contract and tendered the required bond and protested its willingness to perform the contract and tendered bond in the proper amount.

The court then says:

“A single question arises. It is: Can the municipal authorities, after determining to award a contract to one who has been, by resolution duly adopted, found to be the lowest and best bidder lawfully rescind such action and refuse to notify such bidder of its resolution and to enter into a contract with him, the bidder having in all respects complied with the requirements of the advertisement for bids and having shown that he is able, willing, and ready upon his part to enter into such contract?

“The question would seem to be answered by a consideration of Section 1536-679, Rev. St. (Section 143, Municipal Code), which, among other things, provides that the directors of public service may make any contract for any work under the supervision of that department not involving more than five hundred dollars, but that, when such expenditure will exceed that sum, the expenditure shall first be authorized and directed by ordinance of council. Then follow directions as to advertising for bids, specifications, of what the bid shall contain, for check or bond to accompany the same, for the opening of bids, that the board shall make a written contract with the lowest and best bidder, but that the board may reject any and all bids, and that, where there is reason to believe that there is collusion or combination among bidders, the bids of those concerned therein shall be rejected.

“The contention of plaintiff in error necessarily rests upon the claim, expressed in general terms in

the petition, that the duly authorized offer of the board tendered to bidders a proposition which when duly accepted by the relator, as it was by its bid and check, such bid being the lowest and relator being the best bidder, became a contract between the relator and the city; that vested right was thereby conferred upon relator, and it therefore became the plain mandatory duty of defendant to enter into the written contract provided for by the statute. There is apparent plausibility in this claim, but is it sound? It seems to us not. The weakness, fatal, as we think, lies in the assumption that the board had done all the statute requires in order to bind it; that its resolution implies an acceptance of the company's offer, and that there followed an acceptance by the company of the board's resolution and implied offer. Neither condition existed. The act of the board lacked one essential element contemplated by the statute, and required by the advertisement to be done by the board, viz.: Notification to relator of the passage of the resolution finding relator to be the lowest and best bidder. To fairly make the question which the counsel argue the element of notification should be present. At least until notification had been made it could not be claimed with reason that there had been any acceptance by the board of the company's proposition. In no just sense can it be said that the resolution was conclusive or binding on the board. It was in effect a mere mental assent on the part of the board unexpressed by any act which would conclude the negotiation or bind the party. Now was there any acceptance by the company, the attempt to do so having been made after the board had rescinded the only action taken which it is claimed formed the basis of a contract. So there was in fact no tender. One cannot accept that which has not been tendered, and cannot bind another by such attempted acceptance. Unless, therefore, the act of making the bid and putting in the check amounted to an acceptance, there clearly was no acceptance shown on the part of the company, and the bid and check cannot be treated as an acceptance, because all this was tentative and could have no potential effect

until the board had subsequently taken action in conformity with the statute. Necessarily, therefore, there could have been no contract. To accept a contract is to admit it and agree to it; to accede to it, to assent to it; the ordinary meaning embodies assent and agreement. 1 Am. & Eng. Ency. of Law & Prac. 224. And there can be no contract without such acceptance, for as Pothier says: 'A contract includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise.' So it follows that as there was no mutual promise, no meeting of the minds upon the same terms at the same time, there could be no contract. Whatever might have been the legal right of relator to insist upon a written contract had such notice been given we need not in this connection discuss, for no such situation has arisen.

But, aside from the foregoing a further view of the statute would seem to conclusively determine the rights of the parties. Running all through the legislation is a plainly implied if not expressed purpose to clothe the board of public service with the wide discretion in dealing with the making of contracts for street improvements; the various precautionary provisions being intended to safeguard the public in its dealing with contractors. The board may reject any and all bids. If there be reason to believe there is collusion or combination among bidders, the bids of those concerned therein shall be rejected. True, the language is that the board shall make a written contract with the lowest and best bidder (that is, no contract shall be made with any but the lowest and best bidder), but the board is to determine who of all the bidders is the lowest and best, and no limit is placed respecting the time when the determination shall be made, nor is there any requirement refusing to the board the power, usually accorded to all municipal bodies, to rescind their action in a proper case. In the absence of such provision, the proposition is a far one that the usual rule prevails. That rule, well settled by numerous adjudica-



tions, is to the effect that the action of such bodies respecting legislative or administrative matters is not always conclusive and beyond recall, but that they are possessed of inherent power to reconsider their action in matters of that nature, and adopt if need be the opposite course in all cases where no vested right of others has intervened; the power to thus act being a continuing power. The powers involved in this inquiry are administrative powers, and necessarily they must involve the right to reconsider action theretofore taken, and, in the absence of a showing that fraudulent intent existed to the injury of the complaining party, courts will not interfere. In this case, under the statute cited, it is quite clear that the real substantial object to be attained is the making of the written contract. It is the only contract authorized by the statute, and all that precedes it but preliminary to the efficient object, viz., the written contract. Until that is executed the city is not bound. In the present case the board was authorized to bind the city by the written contract specified in the statute, but was wholly unauthorized to bind the city by any other contract.

“As conclusion, we regard the rule, entirely settled, as we think, that, where authority is given by statute to a board to let a contract to the lowest and best bidder, discretion is thus conferred, and courts will not undertake to control such discretion by mandamus applied to this case. *Exp. Black*, 1 Ohio St. 30; *State v. Commissioners*, 36 Ohio St. 326; *State v. Commissioners*, 63 Ohio St. 440, 59 N. E. 104. Among many authorities cited by the vigilant counsel for defendant in error special attention is directed to the following: *Coppin v. Herman*, 6 N. P. 452; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *Red v. Augusta*, 25 Ga. 386; *Water Commissioners v. Brown*, 32 N. J. Law 504; *McClain v. McKisson*, 15 Cir. Ct. R. 517; *Braman v. Elgria*, 5 Cir. Ct. R. (N. S.) 387, affirmed in 73 Ohio St. 346, 78 N. E. 1119; *Yargan v. Toledo*, 8 Cir. Ct. R. (N. S.) 1; Page on Contracts, No. 43, 54; *Edge Moor Bridge Wks. v. Bristol*, 170 Mass. 528, 49 N. E. 918; *Benton v. Springfield Y. M. C. A.*, 170 Mass. 534, 49

N. E. 928, 64 Am. St. Rep. 320; *Dunham v. City of Boston*, 12 Allen (Mass.) 375; *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 19 L. Ed. 884; *Stoddard v. Gilman*, 22 Vt. 568; *Cox v. Mount Tabor*, 41 Vt. 28; *Estey v. Starr*, 56 Vt. 690; *Capital Ptg. Co. v. Hoey*, 124 N. C. 767, 33 S. E. 160.

"It may be added that persons dealing with municipal corporations must at their peril take notice of all grants of power and of all limitations of authority on the part of municipal agents, and that in the present case the relator must be held to have had notice of the scope of the powers of the board and the prescribed manner of their exercise.

"The judgment of the circuit court will be affirmed.  
"Crew, C. J., and Summers, Davis, Shauck and Price, J. J., concur."

There can be no distinction between that case and the one at bar, in that the statute provided for a written contract, for in this case the resolution, which the statute authorizes, provides for the entering into a contract, agreeable to the specifications, which provide for the signing of the same, and which, as found by the trial court, was the intention of the parties.

In the case of *Mann et al. v. Incorporated Town of Rochester*, 29 Ind. Appeals 12, 63 N. E. 874, the appellant, pursuant to an advertisement for bids, submitted a proposal for the construction of certain municipal work, signed the contract and executed the bond required and stood ready and willing to perform all the terms of the contract as provided for in the specifications therefor. And in that case

the court holds that no contract was executed between the parties, as follows:

“The requirements of the act of 1879 relating to the making of contracts by the trustees of waterworks are therefore applicable to the board of trustees of the town, except the provisions relating to ratification of contracts of the trustees of the waterworks and the approval of bonds, the giving of which it was their duty to require. It is the purpose of the statute that a contract shall be received before the bidder shall acquire any right to perform the work. His right is not fixed by the ascertainment that he is the lowest bidder. Great latitude of discretion is given to the board of trustees, and, if in their opinion he cannot be depended upon to do the work with ability, promptness and fidelity, they may give the contract to next lowest bidder or decline to contract and readvertise. They are not limited in this regard until they have actually contracted. There was nothing in the published notice for bids to authorize an inference of a proposal to regard the announcement of the lowest bid and the award of the contract to the lowest bidder as final without the subsequent execution of a contract by the town.

“In connection with the entry of record of the awarding of the contract, as shown by the complaint, it appears that the board directed its attorney to prepare a contract for such work and forward the same to the appellant, which he did. It does not appear that the board executed this contract or dictated its provisions, or had knowledge even of the contents of the instrument. The attorney was directed to prepare ‘a contract.’ This, of course, did not make the appellee a party to the contract. On the contrary, considering the statute and the action of the board together, it is indicated that the board reserved its right to exercise its discretion to ‘decline to contract.’

“In bidding for the work, and in signing the contract and offering the bond, the appellant were charged

with knowledge of the powers and duties of the officers of the municipal corporation under the law, and were bound to know that all the various acts of the board of trustees and all their own acts in the premises were but steps leading up to the necessary contract, and would be ineffectual for any purpose unless a contract were executed by the municipal corporation, through its official agents, pursuant to the statute. After the officers of the municipal corporation have fully exercised their discretionary official authority to make or not to make a contract in the interest of the corporation, and in pursuance of statutory directions have executed a contract in the interest of the corporation in its proprietary character, it is not to be supposed that the corporation can arbitrarily repudiate the engagement made for its advantage as a corporation. On the contrary, such a contract, fully made, will bind the municipal corporation, as like contract would bind a private corporation. But until the agents of the public corporation have exhausted their official discretion confided to them by law in the interest of the portion of the public represented by them, the corporation is not irrevocably committed as a contracting party. In the matter of the construction of waterworks to be owned and managed by the city or town under the statutes above quoted, the municipality is under the protection of the discretionary authority of the official representatives, honestly exercised in its behalf, up to the final execution of the contract by them, and is entitled to receive through them the benefit of the exercise of their best judgment, based upon all information acquired by them, until their discretionary power is exhausted by the execution of the contract.

“While the work here contemplated was to be undertaken in the interest of the community, the system of waterworks was to be the property of the corporation, and under its control and management as corporation property, and the corporation was to use it for its own benefit, and was to derive therefrom a special revenue. The making of a contract for construction

of such works was not the exercise of any of those continuing legislative or governmental powers which may not be ceded away so as to deprive the public corporation of future performance of its duties to the public on behalf of the state. On the contrary, such an engagement would constitute a contract, and therefore would not be revocable at the will of one of the parties thereto. The town was competent to contract, and, being so, it, like a private corporation, could not arbitrarily recede from its engagement. Yet the exercise of the authority reposed by law in those officials involved the imposition of a special tax upon the taxable property of the town. It also had relation, amongst other things, to the adequate protection of property within the town from fires, to the cleansing of market houses, the flushing of sewers, and other sanitary purposes. The language of the statute relating to the making of the contract is capable of being construed so as to still leave these matters, as results and purposes of their contemplated action, to the sound judgment of the municipal officials, exercised in good faith, until the contract shall have been executed by them.

"It is the manifest meaning of the statute that the contract provided for thereby shall be a contract in writing, and it sufficiently appears to have been the purpose of the parties that the terms agreed upon by them should be reduced in writing, and should be signed by them, before the contract would be considered as completely made; and where such is the case, especially if one of the parties be acting in a public capacity, all that goes before such completion must be regarded as negotiations for a contract or steps leading to a contract. When all was done, something remained to complete the contemplated contract. *Commissioners v. Brown*, 32 N. J. Law 504; *People's R. Co. v. Memphis R. Co.*, 10 Wall. 38, 19 L. Ed. 844; *Dunham v. City of Boston*, 12 Allen 375; *Edgar Moor Bridge Works v. Bristol Co.*, 170 Mass. 528, 49 N. E. 918. Being of the opinion upon the foregoing considerations, that the complaint does not show a breach of contract or an action-

able violation of duty on the part of the appellee, we need not discuss the form of the complaint or the subject of damages. Judgment affirmed."

See also:

*State v. Noyes*, 25 Nev. 31, 56 Pac. 946.

*Eads v. Carondelet*, 42 Mo. 113.

*Starkey v. Minneapolis*, 19 Minn. 203 (166).

*Mississippi and Dominion Steamship Co. v. Swift*,  
29 Atl. (Me.) 1063.

*Hodges v. Sublett*, 91 Ma. 588, 8 So. 800.

*Condon v. Darcey*, 46 Vt. 478.

*Hamilton v. Clepard*, 9 Wash. 352, 37 Pac. 472.

*McKee v. City of Greenburg*, 66 N. E. 1009, 160  
Ind. 378.

*Smart v. City of Philadelphia*, 54 Atl. 1025, 205  
Pa. 329.

*Press Pub. Co. v. Pittsburg*, 207 Pa. St. 623, 57  
Atl. 75.

The attention of the court is particularly directed to the case of *People's Pass. Ry. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 38, 19 Law Ed. 844, as the principles enunciated in that case seem to the appellees to govern completely the points involved in this proposition.

**Appellant Knew and Acted Upon the Assumption That the Contract was Not a Completed One.**

#### SIXTH PROPOSITION.

*The conduct of the appellant in having his attorney prepare formal written contracts and the offering of them to the City Council for acceptance, and to be signed, contradicts appellant's contention that such formal contracts*

were not contemplated and the offer and acceptance not conditional upon the execution of final written contracts. Such action is conclusive that appellant knew that something more was contemplated by the parties than the bid and acceptance upon the minutes of the council; and when appellant prepared and signed the formal written contracts it was an admission that he did not regard the bid and acceptance as a completed contract; and if it was not such a completed contract, then he is not entitled to maintain this action.

On page 671 of 28th Cyc. it is said:

"Municipal contracts are, equally with other contracts, subject to the principle that, to constitute a contract, the minds of the parties must meet both as to the subject matter and as to the terms. Therefore a binding contract on which action will lie is not made where the price is not fixed, or where, although there has been substantial agreement, the parties recognize something remaining to complete its execution."

Citing:

*Santa Rosa Lighting Co. v. Woodward*, 119 Cal. 30, 50 Pac. 1025; *Fleming Mfg. Co. v. Franklin* (Iowa, 1905), 103 N. W. 997. Although a contract for advertising had been let by a city under Pa. Act, March 7, 1901, Art. 15 (Pamphl. Laws 36), as amended by the act of June 20, 1901 (Pamphl. Laws 592), and the award had been accepted and the contract reduced to writing, and accepted by the successful bidder, and delivered by him to the city, it was held that no contract existed where such contract was unsigned by the recorder, although his failure to sign was due to his

sudden death immediately after the delivery of the contract to him and before he could affix his signature. *Press Pub. Co. v. Pittsburg*, 207 Pa. St. 623, 57 Atl. 75. So, where bids for the building of a street railroad were invited by a city, and in response thereto an unincorporated company submitted proposals, and the city accepted them subject to a modification which the company agreed to, but no formal contract was signed, and a resolution was then passed by the city enabling the company to become incorporated, and declaring that the "proposals heretofore made and accepted" by the parties respectively should not thereby be changed, it was held that there was no perfected contract between the city and the unincorporated company. *People's Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 38, 19 L. Ed. 844.

In *Santa Rosa Lighting Co. v. Woodward*, 119 Calif. 30, 50 Pac. 1025, the Supreme Court of California, in holding that a contract for certain lighting was not yet complete, notwithstanding a vote of the council accepting the bid, and a formal contract drawn by the City Attorney had been signed by the complainant, said:

"The contract bears strong evidence that something more was contemplated by the parties on July 3d than the offer and its acceptance as shown by the minutes, and that the company signed it indicates that it did not regard the offer and acceptance as a completed contract. \* \* \* Respondents contend that there was nothing omitted in the offer and acceptance to make a completed contract; that the acceptance was not conditional upon the execution of a formal contract;



that the formal contract could not contain any new condition; that the minds of the parties had met and agreed, and neither party had a right to insert other conditions or provisions. It seems to me that the conduct of the company in executing the formal contract with the new conditions (if they can be regarded as new) contradicts respondents' assumption that this formal contract was not contemplated. This assent is more than a tacit concession that the offer and acceptance were incomplete as a contract. It is the written admission that something more was to be done, and with the company's consent."

And this same circumstance constitutes in this case a further and conclusive proof of the knowledge and full acquiescence of appellant in the purpose of the city to retain in its mayor and councilmen the full power to control or reject any bid up until the final signing of the formal written contract is to be found in Section 9 of the contract which appellant's counsel tendered to the city to be signed. (See page 162 of printed record.)

In the section named the appellant used and offered the following condition:

"9. This contract is entered into subject to the approval or rejection of the Council of the City of Oklahoma City, and *it shall not bind either party until so approved and confirmed* and is subject to all city ordinances now in force relating to such matters."

We do not quite understand what appellant's counsel meant by putting such a provision in this contract and then contending in this Court that a binding contract, covering this whole transaction, had previously been consummated in the vote of the City Council to accept the appellant's bid.

Did appellant's counsel regard the words "*it shall not bind either party until so approved and confirmed*" as being child's play, or a hollow mockery, or if on the contrary, did he not, by so doing, further confirm and acquiesce in the knowledge of the intent of the city to at all times until the final execution of the written contract, retain the right to exercise its best judgment and discretion in accepting or rejecting such contracts?

It appears to the appellees that, after using such a provision in the attempt to secure the signing of appellant's contract, that he is estopped from now asserting that he had such a contract as was beyond the right of the city to reconsider or reject.

### **Was a Legal, Binding Contract Entered Into?**

#### **SEVENTH PROPOSITION.**

*Where a city, on advertising for bids for a municipal improvement, both in the specifications and in the advertisement, reserved the right to reject any or all bids, and stated that the successful bidder must enter into a written contract to perform the work, and complainant knew from past experience, in executing similar contracts with said city, that he would be required to enter into a written contract according to an adopted form in case his bid was accepted, and in his bid he provided that he would commence the work within a given time after signing the contract, a mere role of the city council to accept one of complainant's bids*

*and to award a contract to him which was thereafter reconsidered, no written contract ever having been executed, was sufficient to show the execution of a contract for the work between the city and complainant pursuant to his bid.*

We take it that questions raised by the appellant other than the binding force and effect of the acts and proceedings of the Mayor and City Council need scarcely to be considered in view of the all-important question whether or not the record shows the execution of a contract.

Without setting forth in full the requirements of the statute for the construction of paving, the same having been set out in appellant's brief, the first step necessary to be taken in the absence of a petition therefor, is the passage of a resolution by the Mayor and council declaring the necessity for the construction of the improvement.

This resolution must be published in six issues of a daily newspaper and in the event the owners of more than one-half in area of the land liable to assessment to pay for the improvement shall not, within fifteen days after the last publication of the resolution, protest against the same, the Mayor and City Council shall have the right to proceed further in the construction of the improvement.

The next step taken by the Mayor and council is the adoption of a resolution properly reciting among other things that no protest had been filed and that the council would proceed with the improvement and define the character, extent and width of the same and character of ma-

terial to be used and such other matters as may be necessary to instruct the engineer in the performance of his duties in preparing for such improvement, the necessary plans, plats, profiles, specifications and estimates.

And the resolution shall further set forth any reasonable terms and conditions as the Mayor and council shall deem proper to impose with reference to the *letting of the contract and the provisions thereof*, and in addition to this the resolution shall provide for the execution of a good and sufficient bond for construction and may require, in the discretion of the council, a maintenance bond.

The clerk is then directed to advertise for bids and the Mayor and council shall *examine* all bids received at the time and place specified in the notice, and without unnecessary delay, award the contract to the lowest and best bidder who will perform the work and furnish the material which may be selected, and perform all conditions imposed as prescribed in the resolution and notice of proposals.

At the time and place fixed by the notice, the Mayor and council did examine all bids submitted, and decided to have the work constructed under the ten year guarantee, and they thereupon voted to award the contracts to the appellant, he being the lowest bidder under the ten year guarantee class of bids; but, at the next meeting of the council, that body decided to construct the work upon the five year guarantee plan, and with such purpose in view it reconsidered its previous decision to accept the ten year

plan, and carried a motion to accept the five year plan, in lieu thereof; and upon considering the bids, under the latter plan, it was decided by the council that the bid of the R. F. Conway Company was the lowest and best bid.

The action of the City Council in rescinding its previous decision to accept bids upon the ten year maintenance plan was done, as the record shows, before the execution of a formal written contract and before the tender, by the appellant, of either a construction or maintenance bond. The record discloses that the appellant has never tendered either a construction or a maintenance bond as provided by the resolution and notice to contractors and the statute. Under these circumstances, therefore, did the appellant and the city enter into a contract?

The position which appellees take in this case is, that the contract was not a completed contract, that the minds of the parties had not met, that the award, so called, was merely the official declaration that the appellant was the most satisfactory bidder, under the ten year maintenance plan, and that his bid would be the subject of a formal contract; that numerous requirements of the law had not been complied with at the time of the award; that the so-called acceptance was never communicated and the minds of the parties thereto did not meet so as to enter into a binding, legal, valid contract upon which rights and liabilities became vested.

In this case the city had by its specifications, advertise-

ment for bids and contracts, prepared for such cases, provided expressly for a written contract, and the appellant had actual knowledge of these requirements in making previous contracts, and assented to them in providing in his written bid that he would commence work within a certain time after the signing of the contract, and did prepare and offer formal written contracts to be signed.

Under such a state of facts the question here is not whether in the absence of these requirements there would have been a contract or the right to maintain an action of mandamus, but was the city bound the moment it voted to award the contract to McCormick, or was it necessary in the absence of a waiver to give him notice of the award and to prepare and sign a written contract?

The question is whether the appellant had such a contract as that an action for specific performance or injunction would lie in view of the fact that the specifications, advertisement for bids and contract prepared and regularly used by the city expressly contemplated a formal written contract, and that these facts were known and assented to by him.

Judge Dillon says:

"After the opening of the bids, the ascertainment of the lowest or most favorable bidder, and the adoption of a resolution that the contract be awarded to him, does not make a completed contract between the municipality and the bidder when the charter requires that all contracts relating to city affairs shall be in writing,

or when the advertisement so specified." *Dillon on Municipal Corporations*, 5th Ed., 810.

And it is stated in the *American and English Encyclopedia of Law*:

"Where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon." 7 *Am. & Eng. Enc. of Law*, 2nd Ed., 140.

"A vote accepting a bid is not a contract where a provision is distinctly made for the future execution of a formal contract." 20 *Am. & Eng. Enc. of Law*, 2nd Ed., 1170.

And in *Cyc.* it is said:

"Where parties are merely negotiating as to the terms of an agreement to be entered into between them, there is no meeting of minds while such agreement is incomplete. Thus where they intend that their verbal negotiations shall be reduced to writing as the evidence of the terms of their agreement, there is nothing binding on them until the writing is executed."

Of course the distinction must be borne in mind between the enforcement of an executory and an executed contract.

If with the acquiescence of the defendant the plaintiff had gone on without a written contract and executed the contract they were negotiating upon and the city had received the benefits it is probable it could not have defeated him in an action to recover the bonds.

The rule undoubtedly is that if the parties have completed their negotiations and reached an entire basis of

agreement and one party with the knowledge and acquiescence of the other had gone on and performed the contract in whole or in part without the formal reduction of the contract to writing the other party will be held to have waived the execution of the written contract. And especially is this true where a property owner is resisting an assessment under such proceedings.

We shall therefore assume that where parties have fully agreed upon a contract but have simply decided to reduce it to writing as evidence the contract may be enforced, especially where it has been executed in whole or in part by the party seeking its enforcement with the knowledge and acquiescence of the other party, notwithstanding the failure to reduce it to writing. But if the parties have stipulated in effect that the contract shall only be in force from the time it is reduced to writing and executed there is no completed contract until it is put in writing as agreed.

In the case of *Carskaddon v. City of South Bend et al.*, 39 N. E. 667, the court says:

"The following resolution was then adopted by the council: 'Resolved, That the Mayor of the City be instructed to purchase the property known in the proceedings of this council as the Carskaddon property, for the sum of \$20,000.00. Said purchase to be made subject to the incumbrance thereon, \$4,000, to be paid in cash and the balance of \$5,000 to bear interest at 6 per cent for a time agreed upon by said Mayor and Carskaddon.' It was alleged generally that the proposition contained in the resolution was accepted by the



appellant, and that it was the intention of the mover of said resolution, and of the council in adopting it, that such action should complete the purchase of said property, and that the Mayor should act in receiving the deed and in executing the notes and mortgages. A tender of the deed to the Mayor and other steps by the appellant in compliance with the terms of the resolution were alleged. In one paragraph, reformation of the resolution was sought, by which the alleged intention of the appellee should be established, and thereupon to enforce specific performance.

Elaborate and able briefs have been filed by counsel for the parties, and numerous questions have been fully presented, but we are of the opinion that the judgment of the circuit court must be affirmed upon two propositions: (1) The resolution upon its face does not create an obligation on the part of the appellee; and (2) it cannot be amended by parol. Upon the first of these propositions, it is perfectly plain that the resolutions and the proceedings preceding it do no more than express the preference of the common council for the appellant's property, and instructed the Mayor to purchase it. It is without doubt that, as a contract, the action taken included no obligation on the part of the appellant, and was wholly devoid of the elements of mutuality. The oral declaration of the appellant, in the meeting of the common council, that he would accept \$20,000 for his property was not enforceable under the statute of frauds (Rev. St. 1894, Sec. 6629; Rev. St. 1881, Sec. 4904). Nor did his oral acceptance of the terms of the resolution create an enforceable obligation against him. First, for the reason that the resolution was not, upon its face, an obligation on the part of the city to make the purchase; and, second, because the oral acceptance was as much in violation of the requirements of said statute that such contracts should be in writing as was his oral offer of the property at the sum stated. The resolution but directs a purchase upon the terms stated, and by no possible construction can be held to constitute a

purchase. Nor can it be said that the resolution, together with the oral acceptance, constitute a contract to purchase. It is short of a contract, not only in that its terms create no obligation on the part of the appellee, but it is a familiar rule that where contracts are required to be in writing they must be wholly written. This rule is aptly illustrated in the case of *Board v. Shipley*, 77 Ind. 553, where a general order was entered by a board of county commissioners, allowing a bounty, in a sum stated, to each volunteer mustered into the service of the United States under a given call of the president, and which order was accepted, on the part of Shipley, by his enlistment and mustering into the service in accordance with the terms of the order. In a suit for the bounty, it was held that the contract, having been but partly written, and depending in part upon the parol evidence, should be regarded as an oral, and not as a written, contract, and that the six years and not the twenty years limitation applied.

"This rule has been recognized and applied in many other cases in this state. *Overshiner v. Jones*, 66 Ind. 452; *Pulse v. Miller*, 81 Ind. 190; *Wearer v. Shipley*, 127 Ind. 526, 27 N. E. 146; *Board of Commissioners v. Cincinnati Steam Heating Co.*, 128 Ind. 240, 27 N. E. 612; *Gordon v. Gordon*, 96 Ind. 134; *Board v. Miller*, 87 Ind. 257; *Hugh v. Board*, 92 Ind. 580. In *Board v. Shipley*, *supra*, are cited a number of cases holding that resolutions much stronger than the present, in the creation of an obligation on the part of the resolving party, cannot be held to embody a contract."

In the case of *Water Commissioners of Jersey City v. Brown*, 32 N. J. Law 504, the court says:

"A contract does not become complete and binding until reduced to writing and signed, if it appears that such was the intention of the parties; and this rule is especially applicable to a case where one of the parties were public commissioners, and the law under which they

acted made it their duty to make their contracts in writing.

"Until the contract is complete either party may withdraw his consent, and end the negotiation."

And again at page 506 says:

"April twenty-ninth the commissioners adopted the following resolution: 'Resolved, That the Board accept the proposal of L. L. Brown for laying a submerged pipe across the Hackensack river, on the bottom thereof, for the sum of seventy-five thousand dollars, in accordance with the plan previously submitted to this board by said Brown; and that the engineer and attorney of the board be directed to prepare a contract for said work, and submit the same for approval by the board before being executed, said contract to contain a full and ample guarantee that said work will be securely and sufficiently done, and cover a test of at least five years.' A copy of this resolution was sent to the plaintiff, accompanied by a request from the engineer that he would call at the office, as he wished to confer with him in reference to the contract, and notes from the engineer were sent to him on the sixth, seventeenth, and twenty-seventh day of May, requesting to see him in reference to the matter. April twenty-seventh the contract was prepared (produced and marked A). It is in Bacot's handwriting; it was submitted to the board May nineteenth; it was then laid on the table, and no action had on it until the rescinding of the resolution. The minutes of the board, May nineteenth, contain the following entry: 'The superintendent also presented form of contract, specification, and bond with L. L. Brown, for laying thirty-six inch main pipes across the bottom of the Hackensack river; read and laid on the table.' Witness also proved paper B to be the form of agreement and specification. Between the twenty-ninth of April and the second of June, there was a change of commissioners. 'I was present when Mr. Brown came and offered to execute

the contract, some time after June second; May twelfth he sent to the commissioners a letter, naming his securities, A. I. Fitch and C. G. Waterbury.

"The plaintiff testified: I attended on Mr. Bacot for the purpose of agreeing on a form of contract; we agreed; I agreed to submit to them; he wanted less movable joints; he said some of them objected to so many; in my first interview with Bacot, he wanted me to make out my views, and he handed me a printed form; I assented to giving security; they wanted a guarantee for five years; after I received resolution, I had a note with a copy of the resolution, I very soon came over; the next day or two Bacot told me he wanted contract made; he asked me to draw a contract as to what my ideas should be; after he had drawn up form of contract, I offered securities; I tendered myself on twenty-first June ready to make contract; my securities (Fitch was late), Waterbury, was with me; Wortendyke said he was not authorized to consummate contract; he did not object to securities; no disagreement between Mr. Bacot and me about manner of contract, as to specifications.

"Bacot, who was called by the plaintiff, testified: I had several interviews with Brown, after he rendered his proposals, about the form of the contract; there are two forms of contract, one in handwriting of Brown, received from him, and the other in my handwriting; mine is marked A, the other was blank form I gave to Brown; the blank form I gave him was to get his views as to time of finishing work, and to get his specifications for doing the work; form of contract was to be filled up by him; A was assented to by Brown; it was the contract agreed by Brown to be presented to the board; do not know whether securities had been then submitted to the board; think they had not; contract was prepared in April or May, before the rescinding of the resolution; the note from Brown, May twelfth (naming securities) was submitted to the board; there was no objection to Fitch, but they required time to inquire as to Waterbury.

"On the second day of June, 1862, the board adopted the following resolution: 'Resolved, That this board declines the bid of I. L. Brown to lay a pipe upon the bottom of the Hackensack river; and that the resolution passed by this board, April 29th, 1862, accepting said bid, be rescinded.'

"The plaintiff having rested his case upon the proofs thus detailed, the counsel for the defendants moved the court to non-suit him, upon the ground that the proposal of April twenty-fifth, and the resolution of April twenty-ninth, made no contract, as the acceptance by the resolution was not of the very proposal, which motion was overruled, and the cause submitted to the jury. Among other things, the judge charged that 'Brown had made a written proposal to the old board, which had been accepted by them by resolution. Its character had been changed before the second of June, from an open bid to an express contract. Has the plaintiff established, by proof, the material allegations in his declaration? There can be no doubt of that, if you believe the witnesses, and the genuineness of the papers which have been offered in evidence, and the correctness of the minutes of their proceedings.' To the refusal to non-suit, and to this part of the charge the defendants excepted; and these exceptions raise the question now to be determined by this court, viz., was there such an acceptance by the defendants of the plaintiff's proposal as made a contract between these parties, by which they were respectfully bound?

"The offer, on behalf of the plaintiff, was not to show a promise on the part of the defendants, which the law would imply from their acts, but to show an express contract by means of proposals to do certain work and furnish the materials, on the one side, and the acceptance of these proposals on the other. That to constitute a binding contract in such cases, the proposition of one party must be met by an acceptance of the other, which corresponds with it entirely and adequately; and that until the actual completion of the

bargain, either party is at liberty to withdraw his consent and put an end to the negotiation, is the well established law. 1 Pars. on Cont. 329-463.

"For the plaintiffs it was insisted that such an acceptance of Brown's proposals was made by the resolution adopted by the defendants on the twenty-ninth of April; and it is plain that, unless that was so, there was no act of the board, or of any authorized agent of theirs, which could have that effect. That resolution does purport to accept Brown's proposal, in accordance with the plan submitted by him; but it goes on to direct that their engineer and attorney prepare a contract for such work, and submit the same for approval to the board before being executed, and it must be taken altogether. It is plain, I think, from this express provision in the resolution, and from the testimony of Bacot and the plaintiff himself, that Brown's proposal was not accepted entirely and adequately; but that several particulars, as to the time of finishing the work, and as to the manner of doing it, and the guarantee that it would be securely and sufficiently done to cover a test of five years, remained to be settled. These matters appear to have been arranged, so far as the plaintiff was concerned, and to the satisfaction of Bacot, but Bacot was not authorized to bind the board, and did not profess to do so; on the contrary, the resolution expressly required that the contract, when adjusted to his satisfaction and the attorney's, should be submitted to them for their approval before being executed, the evident meaning of which is, that it was to be approved and executed before it was to be binding. Nor did the plaintiff execute, or offer to execute it, until after the board had dissented from it.

"This resolution required a written contract to be drawn and executed, as it was made the duty of the board, by the law under which they were acting, to do. Whether this provision of the law is so far imperative as to render all contracts not in writing inoperative and void, or whether it is to be considered as only directory to the commissioners, was much discussed on the argu-

ment; but it is not necessary for the decision of this case to determine this question. It is evident, however, that both parties were mindful of this provision of the law, and expected to comply with it.

“Even in a case between private individuals, where no writing is required, if it appears that the parties, although they have agreed on all the terms of their contract, mean to have them reduced to writing and signed, before the bargain shall be considered as complete, neither party will be bound until that is done, so long as the contract remains without any acts done under it on either side. *Wood v. Edwards*, 19 John R. 212. The propriety of this rule is still more apparent in a case where one of the parties is acting in a public capacity, and their acts are made binding upon a municipal corporation, and where the law expressly requires them to make no other than written contracts. After the written contract was submitted to the board, they passed no resolution approving it, and did no act in any way signifying their consent to its terms. In about twelve days after it was submitted to them, they expressly signified their dissent, by passing the resolution of the second of June, so severely censured by the plaintiff's counsel, by which they declined Mr. Brown's bid, and rescinded the resolution originally accepting it. If no contract had been so entered into at this time as to be binding, they had a perfect right to do this.

“It was urged for the plaintiff that the action was brought, not for refusing to enter into a written contract, as they had agreed to do. But this argument only begs the question in dispute. If no contract was so mutually agreed upon as to be binding on both parties, as seems to me to be too clear to admit of doubt, neither party was bound to execute the written agreement. Until both parties had assented to its provisions, there was only a negotiation for a bargain, which was never completed, and which neither party was bound to complete.”

In the case of the *State ex rel. Schaw et al. v. Noyes et al.*, 56 Pac. 946, the court says:

“That on the 11th day of May, 1898, in pursuance of said election and in conformity with law, the city council published a notice to the effect that bids would be received until June 13, 1898, for the purchase of bonds, and also written proposals, with plans and specifications, to construct a water system for the city of Reno, to be paid for with the bonds of said city, which bids or proposals should be sealed, and addressed to the proper officer. That in answer to said notice the relators on or about the 13th day of June, 1898, submitted to the city council written proposals, with plans and specifications, to construct a water system for the city, to be paid for with the bonds of the city, in conformity with the notice. That at a meeting of the city council held on the 2nd day of July, 1898, the council passed a resolution accepting the bid of the relators to construct a water system for said city, subject to certain modifications, which resolution was in the words and figures following, to-wit: ‘Resolved, That it is the sense and judgment of this city council that the bid of Messrs. Schaw, Ingram, Batcher & Co. to construct a water system for the city of Reno from bar B, on the Truckee river, composed of the material mentioned in said bid, and of converse patent lock joints, be accepted, and a contract entered into with the said bidder for such construction as soon as the city council is, in law, free and unrestrained so to do, subject to the following modifications: That \* \* \* Messrs. Torreyson & Summerfield be, and they are hereby, directed, in connection with the committee of water, fire, and lights, to draft and submit to this council, at a special meeting to be held at 8 o’clock p. m., on Tuesday evening, July 5, 1898, a proposed contract embodying the terms of the foregoing resolution.’ That at a meeting of said council held on the 7th day of July, 1898, the said council adopted the following resolution, to-wit: ‘Resolved, That the proposed contract with



Schaw, Ingram, Batcher & Co., for the construction of a water system for the city of Reno, Nevada, \* \* \* submitted to, and read in the presence of, this city council, be, and the same are hereby agreed upon, to be performed as soon as the city council is, in law, free so to do.' A copy of the approved contract was fully set out in the petition. By the terms of the agreement, in part, it is provided that the relators should be paid for their work in bonds of the city of Reno, bearing interest as follows: \$25,000, or the nearest approximate amount thereto, at the time of the execution of the agreement; \$25,000 at the time of the delivery of all of the material for the water system at Reno, Nev.; the residue in installments of different amounts at subsequent dates. The relators by the terms of the agreement, were required at the time of its execution, to make and deliver to the city council a good and *sufficient bond*, in the sum of \$50,000, conditioned for the faithful performance of the obligations imposed upon them by agreement. The other stipulations of the agreement are not material to the determination of the questions to be decided in this action, and are therefore omitted. There is also an averment that relators at the time agreed to all the terms of the proposed contract, and are willing, and have ever since been willing, to enter into the same; that the relators thereafter demanded of the city council that it comply with and act in accordance with its proposals, and execute the contract and deliver to the relators the amount of bonds at the time and in the manner provided in said contract; that the said city council was at the time of the commencement of this action attempting to let to other persons the contract for the construction of said water system, in contravention of its acceptance of the bid of the relators; and that the said council was, at the time of the commencement of the action, in law, free and unrestrained to execute the contract. Upon the application, the alternative writ of mandamus issued out of the court, to which the respondents answered, in effect, that on the 25th day of June, 1898, the Reno

Water, Land & Light Company, a corporation, commenced an action in the Second judicial district court of Nevada against the respondents, as the city council of the city of Reno, to restrain and enjoin such council from entering into the alleged and proposed contract with the relators, and from proceeding further therein; that, upon the final hearing and trial of said action, judgment was rendered by said court favor of said corporation on the 4th day of August, 1898, by which judgment and decree the respondents were forever restrained and enjoined from entering into the proposed alleged contract with relators, and from proceeding further in the matter; that said judgment, order, and injunction have never been revoked or modified, and are now in full force, and binding upon the respondents; that an appeal has been regularly taken from said judgment, and the same is now pending and undetermined in the supreme court. It is further shown by the return and answer that the respondents denied that the relators ever gave them notice of their acceptance of the terms of the proposed contract, or of their desire to enter into the same, or of their acquiescence in, or acceptance of, the modification thereof, except that on the 12th day of October, 1898, and long after the rendition of the judgment set up, the relators caused a notice and demand to be served upon respondents, a copy of which was attached to the return. It is further shown by the answer and return that the city council of the city of Reno, at a meeting held on the 2d day of November, 1898, adopted a resolution to the effect that no further action should be taken by the city council in respect to the matter of receiving bids or proposals for the construction of waterworks for said city until the supreme court of the State of Nevada had decided the matter relating thereto then pending in said court. It is further alleged that the city council have at no time intended, nor do they now intend, nor are they endeavoring to contract with any person or persons for the construction of waterworks for said city, nor will they enter into any such contract, until the pending appeal aforesaid shall have been finally

determined. The relators interposed a demurrer to the answer, but we do not deem it necessary to consider separately the questions presented by the same, but such questions, as far as may be necessary, will be incidentally determined in the discussion of the case upon its merits. Under the issues made by the pleadings, it was shown by the testimony of Mr. Schaw, one of the relators, that he was present at the meeting of the city council held on July 7, 1898, at which the contract, as prepared by Messrs. Torreyson & Summerfield, under the direction of the resolution of the city council adopted on the 2d day of July, 1898, and as set out in the petition herein, was read, and that he, as the senior member of the firm of Schaw, Ingram, Batchelor & Co., the relators herein, in response to a direct question from the president of the city council, accepted the terms of the proposed contract. The action of the Reno Water, Land & Light Company against the city council to restrain it from entering into a contract for the construction of a system of waterworks under the proceedings had by the council for that purpose, and under which the relators claim their rights, was instituted on the 25th day of June, 1898. That action was called for the hearing of the motion of the plaintiff for a temporary injunction on the 1st day of July, 1898, at which time, upon statement of counsel for the defendant to the effect that the city council did not intend to accept any of the bids, in the form in which said bids were presented, but that it would probably enter into a contract with some one of the bidders upon the basis of the modification thereof, it was stipulated that the further hearing of the action should be continued until further orders; that the city council, before entering into or executing any contract for the construction of a system of waterworks, should serve a copy of such proposed contract upon the plaintiff; that the plaintiff should, within five days after such service, institute such proceedings to restrain the execution thereof as it may be advised; and that after the commencement of said proceedings the city council would not take any steps which would change the rights of

the parties respecting such contract and the execution thereof until the decision of such action. The stipulation further provided that it should be entered as an order of court in the action. Thereafter, on the 13th day of July, 1898, the plaintiff in the action filed an amended complaint, by which it sought to restrain the city council from entering into the contract for the construction of the system of waterworks provided for by the terms of the contract under which relators claim. The answer of the city council was filed, trial had upon the issues, and the judgment rendered as set out in the answer and return of the respondents herein. The motion of the city council for a new trial was overruled, and an appeal taken therefrom, and from the judgment, to this court. It is also shown by stipulation that A. E. Cheney, the district judge who presided at the trial of that action and rendered the judgment therein, was an inhabitant of the city of Reno, and the owner of a large quantity of property therein subject to taxation.

“Whatever power or authority the city council of the city of Reno may have to enter into the contract set up in the petition will be found in the provisions of the act incorporating that city. St. 1897, p. 50.

“The meeting of July 2, 1898, was regular, and the city council, under the provisions of the act, was authorized to accept the bid of the relators, and to make a valid and binding contract respecting the matters shown. Was such contract made or was such action taken by the city council and the relators at that meeting, standing alone, as would bind the city council and the relators, or create any liability under which the relators could claim any right of action. We think not. The order of the city council set up in the petition, and admitted by the respondents, was not such an acceptance of relators' bid as would, independent of subsequent action, create any liability or any right of action whatever. The bid of relators was not unconditionally accepted by the city council. It was accepted subject to certain modifications specifically set out in

the order itself. No claim or showing is made, either by the pleadings or the evidence, that relators consented or agreed to, or were willing to be bound by, the modifications made; hence there was not, and could not be, any contract or liability under this order. On the contrary, it was shown by the evidence of Mr. Schaw, one of the relators, acting for all, that consent to the modifications suggested was not given by the relators until the matter was again considered by the city council and relators at the meeting of July 7, 1898. It is also shown that the city council did not intend to bind itself or the city by the order of July 2d, or give to the relators immediate and unconditional rights of any kind under their bid and the acceptance thereof, as the order expressly limits the time for entering into the contract with the relators for the construction of the system of waterworks to such time as the city council was free and unrestrained so to do. At the time this order was made an action was pending in a court of competent jurisdiction to restrain the city council from accepting the relators' bid, and, on the day immediately preceding the one on which the order was made, the city council had, upon a showing made in that action by it, to the effect that it would not accept the bid of the relators, except in a modified form, entered into a binding stipulation with the plaintiff in the action not to enter into or execute any contract on such bid, as modified or otherwise, until after it had served a copy of such proposed contract upon the plaintiff, that the plaintiff should have five days after such service to institute proceedings to restrain the execution of such contract, and that after the commencement of such proceedings in the matter which would change the status or the rights of the parties to the action respecting the contract and the execution thereof until the decision of the action. This stipulation was made in open court, and entered as an order thereof. It is therefore clear that the order of the council of July 2d is based upon this action, and the stipulation of the council made therein, and that it did not intend to

create any liability or rights under the order until such restraint was removed."

In the case of *Green v. Cole*, 15 S. W. 317, it is held that sufficient evidence to support a finding that the parties intended that the contract should be binding from the time the terms were agreed on.

See also *Hennessey v. Board*, 77 Fed. 403.

In the case of *Ambler v. Whipple*, 20 Wall. 546, 22 L. Ed. 403, it is held: "Where both parties intend to have a written instrument signed by each as the evidence of any contract that might be made, no contract is concluded until it is fully executed by both parties."

In the case of *Morrill v. The Tehama Consolidated Mill and Mining Co.*, 10 Nev. 125, the court says:

"It is essential to the existence of every contract that there should be a reciprocal assent to a definite proposition, and when the parties to a proposed contract have themselves fixed the manner in which their assent is to be manifested, an assent thereto in any other or different mode will not be presumed.

"Where parties enter into an agreement, and the understanding between them is that it is to be reduced to writing, or, if it is already in a written form, that it is to be signed before it is acted upon, or is to take effect, it is not binding upon them until it is so written or signed.

"In contracts where the promise of the one party is the consideration for the promise of the other, the promises must be concurrent and obligatory upon both at the same time.

"Where the agreement between the parties requires the execution of a bond, to be given by one of the

parties and signed by two sureties, conditioned for the faithful performance of the contract on his part; *Held*, that it was essential to the completion of the contract that the bond should be so executed.

“To render a proposed contract binding, there must be an accession to its terms by both parties. A mere voluntary compliance with its conditions by one who had not previously assented to it does not render the other liable on it.”

In the case of *Eads v. The City of Carondelet*, 42 Mo. 113, was a case where a proposal was submitted by Eads to the city and an ordinance thereafter passed by the city directing the execution of the contract. The fact of the passage of the ordinance was communicated to the plaintiff and he partially performed the terms of his alleged contract, thereunder, but the court held that no valid contract was entered into between the parties if something remained to be done before the completion of the contract. The court in that case held as follows:

“The question here does not relate to the meaning or interpretation of the supposed contract, but is whether there was any contract made and entered into which was binding on the parties. There can be no valid contract unless the parties thereto assent, and they must assent to the sense. (1 Pars. on Cont. 475; 1 Sto. on Cont., Sec. 378; *Hazard v. New England Marine Ins. Co.*, 1 Sum. 218; *Green v. Bateman*, 2 Woodb. and M. 359; *Barlow v. Scott*, 24 N. Y. 40.) In *Honeyman v. Marryat*, 6 H. L. Cas. 112, a proposition to sell real estate was accepted, subject to the terms of a contract to be arranged between the parties, and it was held that there was no complete contract in the case. An absolute acceptance of a proposal, coupled with any qualification or condition, will not be regarded as

a complete contract, because there at no time exists the requisite mutual assent to the same thing in the same sense. And when a parol agreement is assented to, which it is understood between the parties is to be put into writing, it is not binding till it is put in that form. If we were at liberty to construe the first section of the ordinance alone, and wholly disregard the other parts, we should find no difficulty in finding the existence of a valid contract. But this we cannot do; the whole ordinance must be taken together to ascertain with what intent it was framed, and what was necessary to be done to carry it into execution and impart to it validity and force. After accepting the proposition of Eads in the first section, the second section proceeds to provide the means for carrying out that acceptance, not merely or exclusively on the terms proposed, but on such further conditions as may be deemed necessary. The mayor is authorized and empowered to enter into a written agreement with Eads, embracing the items of the proposition mentioned in the first section of the ordinance; and, to superadd further conditions which may be deemed necessary for the purpose of properly drafting the contemplated agreement, he is authorized to employ counsel. A written agreement is expressly provided for and contemplated, with such conditions as the mayor, acting for and in behalf of the city, might deem advisable. The ordinance was at once communicated to Eads, and he saw the terms and conditions annexed to the acceptance of his proposition. If he intended to hold the city, it was his duty to have the terms agreed upon and the contract closed by writing."

We invite the Court's attention to the case of *Starkey v. The City of Minneapolis*, 19 Minn. 203, a suit for damages because of the alleged refusal of the city of Minneapolis of permitting the plaintiff to perform certain work for the defendant city, and the question arose as to whether



or not a contract was in fact entered into; an advertisement was had inviting proposals for the work with the right to reject all bids. He being the lowest and best bidder it is alleged the contract was awarded to him and furthermore stated that he stood ready and willing to perform the work, but the court holds:

"To award, is to adjudge, to give or assent by sentence or judicial determination. 'The contract' we can understand either of an agreement between two parties upon valid consideration to do or not to do a particular thing, or of a written instrument which embodies the agreement. The latter is not meant, but we are to understand that the defendant adjudged the agreement to do this work to the plaintiff, that is to say, it decided that it would agree with him to do it. Now, this is neither an acceptance of the plaintiff's offer to build the sewers in Minneapolis, nor a promise nor an offer made to him. It is a decision by the defendant that it will agree with plaintiff upon good consideration to do something which plaintiff has not yet offered to do, and defendant was as free the next moment to change that decision as it was to decide to build no sewer at all on Third street, or elsewhere. One might, it is true, use language incorrectly, and say that he 'awarded a contract' to one, meaning that he accepted an offer as made. In such a case his meaning would be a question for the jury. In the construction of pleadings, however, words are to be understood in their plain and ordinary sense, and so understood, if a pleading does not state a cause of action, the court must necessarily hold it insufficient.

"In the present case, for instance, if it was meant by plaintiff and so understood by defendant, that he offered to build the Third street sewer at those prices by September 30th, and giving bond therefor to defendant's satisfaction in \$10,000 and that the defendant accepted his offer as meant, why not say so?

"We must conclude on these pleadings that it was because the fact was otherwise. But the complaint proceeds to say 'to which award this plaintiff then and there duly assented and consented to the same.' That is to say the plaintiff 'assented and consented' to the defendant's decision to agree with him for the performance of this work.

"The question recurs: if there was a mutual agreement, the defendant to employ the plaintiff, and the plaintiff to do the work, why not say so? The last statement no more amounts to such an allegation than what preceded it. Such words *per se* import no obligation on the plaintiff's part to do the work. A mere assent does not suffice to constitute a contract."

In the case of *Mississippi & Dominion Steam Ship Co. v. Swift*, 29 Atl. 1963, the court lays down this rule:

"Upon the question whether the signing a written draft of the terms is essential to the completion of a contract, *held*: If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract. If, however, it is viewed as the consummation of the negotiations, there is no contract until the written draft is finally signed.

"The burden of proof is upon the party affirming the completion of the contract before the written draft is signed.

"In determining which view is entertained in any particular case, several circumstances may be helpful, as whether the contract is of that class which are usually found in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations.

"If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract."

In the case of *Hodges v. Sablett*, 91 Ala. 588, the court says:

"Where the parties orally agree upon the terms of the contract and there is a final assent thereto so that no variation can be introduced into the writing except by mutual consent, the mere suggestion or intention to put it in writing at a subsequent time is not of itself sufficient to show that they did not mean the parol contract to be complete and binding without being put in writing. Parties may, however, agree verbally upon the terms of a contract, and yet stipulate that it is not to be binding until put in writing; in such case such a stipulation becomes an operative term of contract, and unless reduced to writing and signed by the parties, does not constitute a complete and binding agreement."

In the case of *Fredericks v. Fasnacht*, 30 La. Ann. 117, it is said:

"The distinction is manifest between those cases in which there is a complete verbal contract which the law does not require to be in writing and a subsequent agreement that it should be reduced to writing, and those in which it is part of the bargain that the contract shall be reduced to writing. In the first class of cases the original verbal contract is in no manner impaired by the failure to carry out the agreement and put it into writing. In the second class of cases the final contract is suspended, the contract is inchoate, incomplete, and it cannot be enforced until it is signed by all the parties."

In the case of *Luman v. Robinson*, 14 Allen 242, the court says:

"The question always is, did the parties mean to

contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound."

In the case of *Weitz v. Des Moines*, 44 N. W. 696, it is held that if a bid for work is accepted with the understanding that the contract shall be reduced to writing there is no contract which will support an action for the price of the building if the writing is not executed.

In the case of *Congdon v. Darcy*, 43 Vt. 478, it is held that if by agreement of the parties their negotiations are to be reduced to writing there will be no perfect contract so long as the act of reducing it to writing and signing it remains to be done.

See also the case of *Maddon v. The City of Boston*, 58 N. E. 1024.

We desire also to call the attention of this Court to the case of *West Chicago Board of Commissioners v. Carmody*, 139 Ill. App. 635, a case very similar to the case at bar. The Illinois court says: "Manifestly he was not entitled to receive a formal contract executed by the defendant until he should furnish such bond." In this case, we maintain that the giving and approval of the construction and maintenance bonds are conditions precedent to the execution of any contract. The council has no discretion in the matter, but the statute absolutely requires that the contractor shall give a satisfactory construction bond and the

council may require the maintenance bond which it did in this case. The bonds required are conditioned for the faithful performance of the contract. How, then, can appellant be heard to say that he has a completed contract when the condition upon which he may receive a contract may never be fulfilled? And though neither of these bonds may be given, yet how can a simple award constitute a binding contract between the parties?

Reference is made to the contract tendered by the appellant found in the printed record, page 164, as follows:

"It is further agreed that the contractor shall at the time of the approval of this contract by the Mayor and council of the city furnish a construction bond in the amount of twenty (20) per cent of the total amount of the contract price for the faithful completion of the work in strict conformity to the plans and specifications of the said city engineer, a copy of said bond is hereto attached; and that upon the approval of said bond by the Mayor and council this contract shall become effective."

How, then, in the face of the very contract which is tendered as part of the pleadings of the appellant can he claim that the contract was in full force and effect when by the terms of the very agreement submitted by him, the approval of the bond completes the contract and makes it effective? In his pleadings, he recognizes the fact that all steps taken prior to the approval of the bond are merely negotiations leading up to the final act and the making effective and enforceable the mutual agreements of the parties. No other argument need be advanced to this Court than

this clause of the tendered proposed contract showing that the parties themselves recognized that until the last act was taken, neither party should be bound by previous negotiations.

In the case of *Kalamazoo Novelty Manufacturing Works v. McCakuster*, 40 Mich. 85, the plaintiff was employed as superintendent by resolution of the board of directors and the court holds that the passage of this resolution before legal acceptance did not constitute a contract.

See also *Peck v. Detroit Novelty Works*, 29 Mich. 313.

See also *Platter v. Board of Commissioners*, 2 N. E. 544.

In the case of *Edge Moor Bridge Works v. Inhabitants of Bristol County*, 49 N. E. 918, the court says:

"This was an action of contract, in which the plaintiff, in its declaration, alleged that defendants, by the county commissioners, had advertised for proposals for the building of a bridge; that plaintiff submitted a proposal, and complied with all the conditions of the advertisement and that afterwards the commissioners voted to accept plaintiff's bid, subject to certain conditions, involving an acceptance by plaintiff of the condition that the contract should depend on certain legislative action; that plaintiff agreed to such conditions, but the commissioners refused to award plaintiff the contract.

"ALLEN, J. The ground of action relied on by the plaintiff corporation is not that the county commissioners actually entered into a contract with it, under which it was to do the work, but that they agreed to enter into such a contract, and afterwards refused to do so. To support this view, the plaintiff relies on the vote of the county commissioners accepting its bid and

awarding the contract. We have therefore to consider whether, in view of the circumstances, the vote bears that construction. The vote is to be construed with reference to the advertisements under which the proposals of the plaintiff were submitted. The contract mentioned in the vote is the same contract mentioned in the advertisements, namely, the contract which was to be executed within six days from the date of notification of the award, and of the preparation and readiness for signature of the contract. A formal written contract, according to the form submitted to the bidders, was expressly provided for. After the award, the parties were to meet and execute such a contract. Where proposals and an award made thereon look to the future execution of the contract, such an award is not necessarily a contract of any kind, nor an agreement to enter into a contract based upon the proposals; it is, at most, a matter to be determined whether such an agreement exists, upon a consideration of the terms and purpose of the award, construed in the light of the existing circumstances. In *Layman v. Robinson*, 14 Allen 242, where it was sought to establish a contract from letters, it was said: "A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as preliminary negotiation. The question in such cases always is: Did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound?" See also, *Ridgeway v. Wharton*, 6 H. L. Cas. 238, and cases there cited; *Winn v. Ball*, 7 Ch. Div. 29; *Rossiter v. Miller*, 3 App. Cas. 1124; *Starkes v. City of Minneapolis*, 203 (Gil. 166); *Eads v. City of Carondelet*, 42 Mo. 113; Pol. Cont. 41. Especially where the supposed contract is found only in a vote passed by the board of public officers, which looks to the preparation and execution of a formal contract in the future, care must be taken not to hold that to be a contract which was

intended only to signify an intention to enter into a contract. See *Dunham v. City of Boston*, 12 Allen 375; *Commissioners v. Brown*, 32 N. J. Law 504, 510.

"In the present case, the county commissioners had advertised for proposals for doing a public work, with careful provision looking to the final execution of a formal contract between themselves and the bidder whose proposals should be accepted. The bidders were to be bound to stand by their proposals under a certain penalty or forfeiture. But the county was not bound until subsequently it should agree to be bound. The plaintiff concedes that no contract was made under which the work was to be done, but insists that the county commissioners did agree that they would thereafter enter into such a contract. We are unable to put that construction upon the vote. While it is possible for a party to agree in express terms to enter into an executory contract in the future (*Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90; *Pratt v. Railroad Co.*, 21 N. Y. 305), the present case is not one of that description.

"The vote was but a step in the negotiations. It showed an expectation and an intention, for the time being, to enter into a contract with the plaintiff, upon the basis of its proposals. But the execution of the contract was an act to be done in the future, and, till that should be done, no intention to be legally bound is fairly to be inferred. The vote meant merely to say that the plaintiff's proposals were accepted, subject to the preparation and execution of a formal contract. There is nothing to indicate an intention to bind the county by a preliminary agreement that a formal contract should be executed in the future. This is especially apparent when the state of existing legislation concerning the powers and duties of county commissioners is considered. By St. 1897, 137 Sec. 22, it was provided that all contracts made by county commissioners for the construction of public works, if exceeding \$800 in amount, shall be made in writing and



recorded in a book to be kept for the purpose with the records of the county; and that no contract made in violation of the provisions of this section shall be valid against the county and no payment thereon shall be made from the county treasury. By St. 1897, c. 153, a greatly increased strictness was established in respect to expenditures by counties, and the duties of county commissioners in respect thereto were defined, and their powers limited. In these statutes the purpose of the legislature to prevent wasteful or unnecessary county expenses is clearly manifested, and it is open to doubt whether it would now be in the power of county commissioners to bind a county by a preliminary agreement to enter into a future contract for the construction of a public work. This question, however, need not now be determined, because it is quite obvious that the county commissioners of Bristol county were seeking to conform carefully to the spirit of the provisions of the statutes and that by their vote they did not intend to bind the county by a preliminary agreement, such as that upon which the plaintiff relies. Judgment for defendants affirmed."

See also 7 Am. & Eng. Ency. of Law, 2d Ed., 140; 9 Cyc. 280; 28 Cyc. 662.

In the case of *Anderson v. Board, etc.*, 26 L. R. A. 707, the court lays down the following rules with reference to proposals and awards:

"It is claimed by defendant, in support of the demurrer and of the judgment in the trial court, that, as the plaintiffs' bid for the erection of the high school building related to public work, no action can be maintained for the refusal to allow plaintiffs to execute such work. The contention is that bids for public work are not governed by the general principles of the law of contracts. We do not consider it necessary to examine into the soundness of that contention, as we think the ruling the trial judge was obviously correct, even con-

ceding to plaintiffs that the transaction should be treated as an ordinary one between individuals, irrespective of the supposed public nature of its subject matter. That binding obligations can originate in advertisements addressed to the general public may be assumed as settled law today. But the effect to be given to such an advertisement as the basis of a contract depends entirely on the intent manifested by its terms. A public proposal of that nature may be so expressed as to need but an acceptance, or the performance of some act by a person otherwise undesignated, to constitute an enforceable legal agreement; while, on the other hand, the proposal may amount to nothing more than a suggestion to induce offers of a contract by others. The latter sort of proposal has some resemblance to (though imposing a still lighter obligation than) the class of promises described by Pothier as those in which the intent is exhibited (either by the words employed or by the circumstances or in some other manner) not to give to the person to whom they are made the right of demanding their performance. Pothier, *Obligations* (Evans' Ed.), pt. 1, p. 3. Proposals of contract by advertisement have a place in the modern common law of England and of this country, though they have not been so definitely classified in our jurisprudence as in that of some continental nations. Mr. Pollock, in his valuable treatise on the *Principles of Contract*, remarks on this point: 'We have no special term of art for a proposal thus made by way of general request or invitation to all men to whose knowledge it comes.' (4th Ed.)

"Still less have we any scientific nomenclature for that subdivision of the class of public proposals with which we have now to deal, namely, that class in which is disclosed the intent to invite mere offers of a contract, as distinguished from an intent to propose a contract for a direct acceptance by whom it may concern. But the principles to be applied by our law to such proposals are not, on that account, uncertain or obscure. When the intent expressed in the advertised

proposal is reduced to certainty by interpretation, our system of administration of law is fully capable of giving effect to that intent.

••In the case in hand the advertisement has the following caption: Proposals for the erection of the new high school building on Grand Avenue. But the opening lines of the official statement, which follows, show that the caption refers to the proposals to be received, and is not intended to describe the effect of the advertisement as a whole. If there was otherwise any doubt on this point, it is set at rest by the last sentence, viz.: The board reserves the right to reject any or all bids. That language demonstrates the nature of the advertisement as a mere invitation for offers for a contract. As such it did not lay the foundation of a completed contract. It was merely the opening of negotiations for a contract. The plaintiffs' bid was a proposal to build, which the defendant, by the terms of its statement, had the right to reject. The facts in judgment are wholly unlike those considered in *McNeil v. Boston Chamber of Commerce* (1891), 154 Mass. 277, 13 L. R. A. 559, cited on behalf of the plaintiffs. In that case it was found that the defendant had agreed with the bidders to accept the lowest bid, and accordingly was held liable for a breach of that agreement. But in the present appeal that essential fact is wanting. The judgment of the supreme court of Massachusetts proceeds throughout on the assumption that that fact is an essential premise to the conclusion reached, and we think the principles declared by that learned court in that opinion are in no respect discordant with the judgment we are about to pronounce. No claim is advanced in the petition looking to a recovery for fraud or deceit in making the proposals for bids. It is, indeed, asserted that the defendant rejected the plaintiffs' bid 'without cause, arbitrarily and capriciously, through favoritism and bias.' But, if the defendant had the absolute right to reject any and all bids, no cause of action would arise to plaintiffs

because of the motive which led to the rejection of their bid. The right to reject the bids was unconditional. Defendant was entitled to exercise that right for any cause it might deem satisfactory, or even without any assignable cause. Whatever its rules or practice as to the acceptance of bids may have been, plaintiffs' rights cannot be justly held to be greater than those conferred by the published advertisement on which their bid was made. That advertisement was not an offer of a contract, but an offer to receive proposals for a contract. *Spencer v. Harding* (1870), L. R. A. 5 C. P. 561. There is no suggestion that the offer was not made in good faith. On the facts stated, we see no just ground on which the defendant can be held liable. We think the learned trial judge was right in sustaining the demurrer to the petition. The judgment is affirmed."

It must be apparent to this Court that ample evidence was introduced in the trial of the case to justify the court below in finding as a matter of fact that the parties fully understood and intended that no contract should be treated as having been finally made until the same was reduced to writing and approved as to its contents by the mayor and council. The very fact that the appellant tendered a written formal contract and demanded its execution is to our minds conclusive evidence of the fact that he intended that such a contract should be made and no other. For if none were required why tender a formal contract and demand its execution?

A careful examination of the contract tendered will lead to no other conclusion than that the court below was amply justified under the facts of this case in holding that it was the intention of the parties to complete the contract

only upon the performance of the conditions precedent, namely, the execution of approved bond and the execution of written instruments. And as heretofore stated that finding is binding upon this court in the determination of the fact of intention of the parties.

The entire argument of the appellant proceeds upon the false premise that the award was intended to complete the contract. If, as found by the court below, from the evidence, that the parties intended to complete negotiations by means of a written contract embracing all the terms and conditions of the specifications for the performance of the work as well as any other detail of the same and added thereto the execution and approval of bonds, then all the authorities cited by appellant fall of their own weight and cannot be applicable as authority for the contention here made, that the contract was complete in itself, and that nothing remained to be done after the acceptance of the bids and the resolution to award a contract.

We maintain that to award a contract means, and was intended to mean, in this case, by the parties to the same, that the council determined that upon a satisfactory formal contract being executed with the requirements of the statute complied with, then, unless otherwise determined by the council, it would enter into a formal contract.

### Comment Upon Appellant's Authorities.

In connection with this argument we desire to review some of the authorities presented by appellant in support of his contention that this is a completed contract.

The Court will bear in mind the nature of this suit, that it is an injunction to prevent any other person than the appellant from doing any work of improving the streets set forth in the bill, other than himself, brought more than two months after the work had been under way. The appellees and the Conway Company entered into a contract and the work was completed under a contract entirely different from that alleged to have been entered into between appellant here, and which the appellant is seeking damages in this case now, yet this action is founded in equity to prevent the alleged unlawful interference by the appellees in his right to construct the improvements under his alleged prior right.

Bearing in mind this distinction throughout the entire argument, we maintain that the case of *Fort Madison v. Moore*, 80 N. W. 527, cited by appellant, is not in point. In that case the court expressly held that the contract was completed; in fact the work was done under it and upon a suit on a bond given by the contractor, it was held that successful defense cannot be maintained where the parties had treated the contract as completed and performed.

In the case of *Ross v. Stackhouse*, 16 N. E. 581, the

doctrine of estoppel against the property owner was announced by the court, suit in that case having been brought after the work had been completed.

Appellant seems to rely upon the doctrine laid down in the case of *Illinois Trust & Savings Bank v. The City of Arkansas City*, 76 Fed. 285.

An examination of this case shows that the contract relied upon had been in force for a period of four years, the city accepting the benefits thereof, and the company performing all its obligations thereunder. The court expressly held in that case that the ordinance passed was within the power of the city, under the statute, and both parties to the franchise contract had agreed to the terms thereof, the record of the council had been made, the company had filed its written acceptance and bond, and there was nothing further to be done, the contract was positive and definite, and so held by the court in declaring that the minds had met on all the terms thereof, and after user by the city of hydrants provided for in the franchise contract for four years, the city would not be permitted to claim that there was no contract. Note, however, the difference between that case and the case at bar. Did the minds of the parties here meet? Had all necessary steps been taken on the night of November 4th? Had all the essential elements necessary under the statute and the resolution been complied with? Was it completed or was it merely a negotiation leading up to the execution of a binding obligation

within the twenty day period specified in the proposals? It requires to our mind no argument to show the difference in the two cases.

In the case of the *City of Chicago v. Greer*, 9 Wall. 726, 19 L. Ed. 769, a suit for damages for failure to receive hose manufactured by Greer for the city of Chicago, part of which hose was in actual use by the fire department of the city, the court held the city liable under the terms of its contract. In this case no brief was filed by the appellant and nothing showed in the record that the parties had not executed the contract.

The case of *Harvey v. U. S.*, 15 Otto 671, 26 L. Ed. 1206, was a suit for damages growing out of the construction of a coffer dam in connection with the construction of a bridge between Rock Island and Davenport. After the completion of the work, the contractor, Harvey, filed a claim with the Court of Claims of the United States for extra compensation and the United States Supreme Court in passing on this question found that the contract had been duly signed and interchanged and the question decided was whether the contract embraced the coffer dam work or not, and upon the theory of a mistake of the parties permitted the original contract to be reformed, to the extent of enabling the contractor to receive just compensation for the work done.

The case of *Garfield v. The U. S.*, 3 Otto 242, 23 L. Ed. 779, the court held that under the requirements of the post-



office department and by long continued usage in that department the manner of executing contracts by the Postmaster General was sufficient under the statute. All the details and requirements of the department were made in the proposal to carry the mails and in the appellant's acceptance of same nothing remained to be done. The minds of the parties had met on every detail.

In the case of *Rand v. Mayor*, 83 N. Y. Rep. 254, the court based its decision upon the statute of New York then in force, which provided that the contract should be deemed confirmed at the opening of the bid.

In the case of *People ex rel. Ryan v. Mayor*, 31 N. Y. Sup. 920, the court denies mandamus and did not recognize any other theory than that if a contract existed, suit for damages for breach thereof was the only action that would lie.

The case cited by appellant of *Smith v. Mayor*, 10 N. Y. Rep. 504, we have been unable to find, but the Court must bear in mind that all New York cases cited are based upon the statute of New York referred to in the case of *Rand v. Mayor*, above referred to.

In the case of *McManus v. The City of Boston*, 50 N. E. 607, a case involving the proper construction of the statute of frauds in and about the purchase of real estate, the court held that the ordinance passed by the city, directing the purchase of this particular tract of land by the Street Commissioner, and the record of the vote took the trans-

action out of the statute of frauds. The case shows that McManus accepted the communicated offer of the commissioners and the court held the city bound likewise by the commissioners accepting the plaintiff's offer to sell and under the particular facts of that case the court held that it was a binding contract, at least sufficient to satisfy the statute of frauds.

We desire, however, to call the Court's attention to the distinction between this case as an executed contract of purchase of real estate by a municipality and the case at bar, which is a contract for a public improvement, in which the council was exercising delegated governmental powers involving judgment and discretion, and that the *award* here made is only one step necessary under our statute to eventually bring about the executed contract.

The appellant contends that like the McManus case, the acceptance of the bid and the award of the contract to him, ended all negotiations. A simple answer to this contention is, that one of the essential elements under the statute to complete the contract between the appellant and the city was the giving of the maintenance bond provided for in the resolution and notice. How then can it be said that the mere acceptance of the bid presented by the appellant and the award made thereon by the City Council is a completion of the contracts? In the event the appellant failed for a period of twenty days to furnish the twenty (20 per cent) per cent construction bond or the ten (10 per cent) per cent maintenance bond, satisfactory to the com-

cil, in the absence of fraud, would the contract have been enforceable or would the public improvement bonds issued by the city in payment to the appellant for the work under his contract have been valid charges against the property owners? Surely not. Therefore, the appellant assumes a false premise in his discussion of the binding force and effect of *McMannus v. Boston*, in so far as the issue raised in this case is concerned. He assumes that every necessary detail was agreed upon, a conclusion based neither on the law nor the facts in this case.

In the case of *Willis v. Hoss*, 16 N. E. 800, in a suit by the property owner, the court held that where the work was done and accepted by the city and both parties recognized a contract as valid, a property owner was estopped to deny it.

that case presents an entirely different state of facts than the case at bar, wherein not only certain essential requirements remained unfulfilled between the contracting parties, but in addition thereto the action is between the parties to the alleged contract themselves.

In the case of *Denton v. The City of Atchison*, 8 Pac. 579 notice of acceptance of the bid was given and the work completed under the contract as entered into before any question arose thereon; nothing in that case remained to be done; all the elements of the contract were embodied in it, and upon that theory the court denied the contentions of the city.

The appellant then argues that "The legislature of Oklahoma recognized in express terms that the notice inviting bids, the plans and specifications, the accepting of the bid and awarding of the contract by the Mayor and City Council, constitutes a valid and binding contract for the making of public improvements and the statute nowhere contemplates that any other written contract shall be entered into. Sec. 725 Snyder's Compiled Laws of Okla. (in the first portion of this section) provides 'That the Mayor and City Council shall adopt a resolution reciting that no such protest has been filed (by the property owners), or the filing of such petition as the case may be, and expressing the determination of the council to proceed with the improvement, stating the material to be used and the manner of construction, and such other matters as shall be necessary to instruct the engineer in the performance of his duties in preparing for such improvement the necessary plans and plats, profiles, specifications and estimates; said resolution shall set forth in such reasonable terms and conditions as the Mayor and council shall deem proper to impose with reference to the letting of the contract and the provisions thereof.' It will be seen from this language quoted in Section 725 of the Oklahoma statutes that it is contemplated by the law that the plans, plats, profiles and specifications shall set forth the extent, character and width of the improvement and shall state the material to be used and the manner of construction and such other matters as shall

be deemed necessary to instruct the engineer to prepare the plans, plats, profiles and specifications, are a complete statement of the character and extent of the improvement and the material to be used therein, and the manner of its construction; and then in the latter part of this same section, referring to the filing of the bids and the awarding of the contract, it is said: 'At the time and place specified in such notice, the Mayor and council shall examine all bids received, and without necessary (unnecessary) delay, award the contract to the lowest bidder who will perform the work, furnish the material which may be selected, and perform all the conditions imposed by the Mayor and council as prescribed in such resolution and notice for proposals, which contract shall in no case exceed the estimate of costs submitted by the engineer with the plans and specifications.' "

Appellant loses sight of the fact that the approval resolution passed by the council is as much a part of the necessary proceedings and must be as strongly complied with as any other provision of the statute. By that resolution the contract was to be *executed* and in answer to appellant's argument we contend it could mean nothing less than an executed contract between the parties, not one in process of execution, but the executed contract. That resolution provides a forfeiture, not only for failure to *enter into a contract*, but also to *give the required bond within the required time*. The plans, specifications and profiles are but guides to the contractor; the bid is an offer to do the work; the award is the judicial determination of the council that the

bidder shall receive the contract; the notices are jurisdictional; the contract is the completed agreement of the parties.

Was there anything left in the discretion of the Mayor and councilmen after the award was made to the appellant on the 4th of November, 1908, or had all rights accrued to the appellant the moment the vote was taken? It must be apparent to this Court that the request for bids reserves the right to reject any and all bids, and leaving aside for the time being the understanding of the parties with reference to the formal contract to be executed, we maintain that the award of the contract was but an announcement, that the Mayor and council regarded the bid of appellant as the most satisfactory of any submitted, this being but another step required by statute in the negotiations which would eventually result in the execution of the contract.

It may have been necessary, as was in this case, to be further decided by the Mayor and council as to whether or not, under all the circumstances their action had been properly taken to improve the streets at a greater cost with the ten (10) year maintenance or after deliberating thereon, to determine to change their original view of the matter and improve the streets at a lesser cost by means of a five (5) year maintenance; in other words, the question of maintenance of improvement when completed was the all important question before the council and upon this proposition, as well as all others, the council acted in its

judicial capacity which cannot be questioned by the court.

It would be with just as much logic and reason that the appellant say that irrespective of the other requirements of the statute, namely, the execution of the construction and maintenance bond provided for, that the contract was *complete* upon the reception of the bid, and the vote thereon, as it would be for him to say that he had the right to a contract for these improvements, and never execute the bonds required by law. Suppose he had never given the bonds. Could he maintain that he had the right to proceed with the work of improvement? Surely not. Therefore, it is as much a part and parcel of the completed contract that approved bonds for doing this work embraced in the contract should be given as it was to submit the bid for the consideration of the council.

One of the cases relied on by appellant is that of the *American Lighting Co. of Baltimore v. McCuen*, 48 Atl. 352. The Court will observe from the reading of this case that it was a bill for a mandatory injunction to compel the city of Baltimore to enter into a contract for the construction of certain public work in the city of Baltimore, and the case turned upon the unauthorized act of the city solicitor to add to the contract the right of the city to discharge and employ labor for the contractor. The court in that case held that the negotiations had completely ended and the minds of the parties had met upon every detail of the contract and nothing remained to be done, under the statute,

and that the attempt of the city solicitor to add the clause concerning the employment of labor was unwarranted, under the ordinance then in force, and that the contractor could not be compelled to sign a contract with the objectionable clause therein. That case does not bear out the contention of appellant here, that the written contract was not required.

Again in the case of *People ex rel. Lunnay v. Campbell*, 22 N. Y. 496, nothing was decided other than that mandamus would not lie, and that a suit for damages was a proper remedy.

Another case relied upon by the appellant is that of *Argenti v. The City of San Francisco*, 16 Cal. 256, a suit for monies received by the city on warrants issued by the city. In this case Chief Justice Fields expressly holds that the parties accepted the contract; the work completed to the entire satisfaction of the city; the parties treated the contract as having been fully performed and the plaintiff could not be heard to complain.

In the case of *Willis v. Carpenter*, 25 Atl. 425, a suit growing out of the rental of a farm, the question there decided has no application to the facts or circumstances of the case at bar.

In the case of *Drummond v. Crane*, 35 N. E. 90, a contract to pay water rent for a period of ten (10) years at \$750 per year, the court held that the contract was com-



plete, the work done and parties treated the contract as executed.

In the case of *Sanders v. Pollitzer*, 39 N. E. 75, by a majority of the court the contract was sustained, but in that case the court held that the contract was complete and that the parties could not add requirements in the formal contract that were not embraced in the correspondence. There was a complete acceptance in writing after communication and the court bound the parties thereto. That case is clearly distinguishable from the case at bar, in that the contract here was not complete, lacking the essential elements to make it so, namely, the communication to the appellant and the execution of the bonds, as well as the agreement to execute a formal contract.

In the case of *Post v. Davis*, 52 Pac. 903, cited by appellant, being a suit growing out of the leasing of a pasture, it was expressly found that the letters and telegrams constituted the complete contract.

In the case of *Rankin v. Milcham*, 53 S. E. 854, it became a question of fact and found by the jury that the parties did not enter into a formal contract.

And in the case of *Blaney et al. v. Hoke*, 14 Ohio St. 292, the question as to the completion of the contract was also left to the jury, which found that it was complete, and in passing on this question the court says that where the agreement between parties is that anything more shall be done and the contract shall be reduced to writing, it is

incomplete until it is so reduced to writing, it is incomplete until it is so reduced to writing.

In the case of *Roberts v. First National Bank*, 79 N. W. 993, all that is decided is, that the intervenor being a stranger to the agreement could not raise the question as to the completion of the contract.

Following these and other authorities which, as we maintain, are not in point in this case, the appellant reasons that the contract was complete the moment the award was made and that the appellees should be enjoined from permitting the execution of the work under the entirely different contract entered into between appellees and the Conway Company.

The entire argument of appellant is ingenious, to say the least, in the face of the record in this case, as shown by the statement of the appellant himself, who as president of the Parker-Washington Company, executed numerous contracts with the appellees and by the procedure of the City Council, as testified to by the witnesses, Hess and Seales. It was understood and agreed between the parties that no contract should be treated executed until the written contract and the bonds required were approved and accepted between the parties.

We desire in this connection to call the attention of this Court to the specifications found on page 42 of the printed record, which reads, "The first parties agrees to commence the work embraced in this contract within—

days after signing the same." And again we desire to call the attention of this Court to the form of proposal of the appellant found at page 146 of the printed record, which reads, "I agree to commence work within — days after signing the contract, etc." And again to the notice to the bidder, which requires the successful bidder to enter into a contract within the required time, namely, twenty days after the award, and to the subsequent tender of the appellant's formal written contracts and the demand that they be accepted and signed.

How, then, can it be contended that there was to be no formal contract between the parties hereto? How can it be contended that in the face of the proposal made and the check deposited by the appellant, conditioned upon the execution of the contract by him, and giving of the required bond, that the parties did not intend to execute a formal written contract? What is meant by the *signing* of a contract? What is meant by the *entering into* a contract? Certainly nothing less than the parties to the same agree that upon the acceptance of the proposal legally communicated, a legal binding contract, embracing the terms of the specifications and the nature of the improvement would be embodied in the written document to be signed by them.

The court below heard the testimony of the witnesses and found that it was not the intention of the parties to be bound, all the requirements of the law to the execution of the bonds, as well as the reduction of the various propo-

sitions to form, was intended and they merely negotiated until such time as the contract might be entered into. The court expressly found at page 69 of the printed record, "It is therefore clear that it was an understanding of both parties that the contract was not complete until it should be properly executed in writing." A clear finding of fact by the trial court as to what was the intention of the parties relative to the action of the council upon the submission of the bid.

We therefore respectfully submit to this Court that the appellant is precluded here from raising the question of fact relative to the intention of the parties hereto concerning the execution of a formal contract, that question having been passed on by the court below and decided upon the evidence submitted that the intention was to execute the formal contract; that finding carries the same force where there is some evidence to sustain it as is the verdict of the jury upon a like question and will not be reviewed on appeal.

*Wimgirt v. First Nat'l. Bank*, 176 Sup. St. Mich.  
11, 1912.

*Horn v. Gibson*, 103 Pac. 563.

*Campbell v. U. S.*, 2161 Sup. Ct. Mich. 18, 1912.

*Mason v. Smith*, 191 Fed. 502.

*Board of Commissioners v. Irvin*, 126 Fed. 698.

*Southern Pacific Ry. Co. v. U. S.*, 186 Fed. 737.

*Nashville Heat & Light Co. v. Bunn*, 168 Fed., at  
865.

*Actua Indemnity Co. v. J. R. Crow Coal & Mining  
Co.*, 154 Fed., at page 545.

*U. S. Fidelity & Guaranty Co. v. Board of Commissioners*, 145 Fed., at page 151.

The specifications in the case at bar called for bids on two different periods of maintenance guarantee. The right was reserved to reject bids. All bids under the ten year guarantee were rejected, and no bid of the class which appellant made was ever adopted.

The city clearly retained the right to exercise this privilege, and plaintiff was aware of this reservation; and in at first deciding to accept appellant's bid, under the ten year guarantee, it gave up no right to make a subsequent rejection of the ten year bids; and to exercise its more mature judgment in that respect for the best interests of the persons whose property was to be affected.

Appellant in this transaction contracted with the city, with the knowledge that it was simply acting under legislative functions, imposed by the statute, relative to constructing public improvements and assessing the cost thereof against the property owners. The plaintiff knew that the city, as such, had no business interest in this transaction. That it was seeking no profit, and incurring no liability of the city as such, for the appellant was to be recompensed in bonds to be paid out of the proceeds of special assessments against the property improved. That no liability was being incurred by the city and that its acts were legislative only, delegated to it by the state as a method of carrying out this particular function of government.

In every manner possible, by warning in the notice asking for bids, by the provisions of the specifications, by the uniform custom previously adhered to and conformed to upon other occasions by the plaintiff, and by the emphatic acquiescence of plaintiff in his bid, wherein he stipulates "*to commence work — days after the signing of the contract,*" the city impressed upon the appellant the fact that the end of the negotiations were yet in the future; and that the consecutive consummated acts were merely steps leading to a final contract.

It was the duty of the city officials to protect the interests of the property owners. Discretion was lodged in them for that purpose. They were to decide what was the best bid; whether any of the bids were good or not, and to put such stipulations in the contract as would protect the property owners, who were not permitted by any formula to protect themselves.

The reservation of the right to reject bids was notice of the intent of the city to retain control of the letting of the work until the city officials were finally and fully satisfied that the best interests of the property owners were being wholly conserved.

Much has been said and many cases cited in plaintiff's brief in an effort to bring the acts of the city in this case under the rule applicable to individuals in contracting with one another. Our contention is, even under such a construction, that in this case a contract had not been con-

summed; however, this transaction should not be viewed from such a standpoint. The city was exercising only delegated legislative authority in making the contemplated improvements, and were invested with delegated power and discretion wherewith to safeguard the interests of the property owners and to enforce the payment of compensation to the contractor through the issuance of special tax bills. Only by force of the statute were they acting. No interests of the city as such were involved. No fraud is alleged, but because of the misjudgment, if such it be, of the city officials charged with this duty, now the appellant seeks to recover damages directly from the municipality and to punish the taxpayers in damages, when, even if he had completed the improvements the appellant could not have recovered his compensation from the city, but must have looked therefor to the property owners.

We feel sure that this Court on an examination of the record and pleadings in this case cannot reach any other conclusion than that the lower court was right in its findings of fact and conclusion of law that the parties dealing with each other upon the basis of public contract work, with the rights and privileges incident thereto, understood and intended that no contract should exist between the parties until formally executed. And upon this proposition rests

the entire case. Of course, the essential elements of the contract must be present, the minds must have met, the consideration must be there and the communication of the acceptance must be shown.

We maintain the proposition that neither one of the essential elements necessary to make a binding contract is in this case, therefore of necessity the appellant has no rights to maintain in this court.

While this brief has been extended and enlarged beyond the requirements of the case, yet we have endeavored to give a full and complete statement of our position to the Court as we believe the facts and the law justify herein.

After all, the issue is a simple one. Much might be said upon the equity power of this Court, the right to mandatory injunction, and specific performance, and numerous authorities cited upon those propositions in addition to those already cited, yet we believe firmly that this Court will take the one view of this case: Is this or is this not a valid binding contract between the parties, taking into consideration, of course, on appeal and review only errors committed by the court below upon the application of the law to the facts as found upon this particular question?

With faith that the position of the appellee is, and at all times has been right, and that in the performance of its



duty it has served the best public interests and has acted strictly in compliance with law, this cause is submitted to the consideration of this Court with the firm assurance, as we believe, that this Court will affirm and sustain the decision of the United States Circuit Court of Appeals for the Eighth Circuit, in affirming the decision of the District Court of the Western District of Oklahoma.

Respectfully submitted,

J. W. JOHNSON and  
V. V. HARDCASTLE,

*Solicitors and Attorneys for Appellees.*

**McCORMICK v. OKLAHOMA CITY.**

**APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE  
EIGHTH CIRCUIT.**

No. 170. Argued March 4, 1915.—Decided March 15, 1915.

Where the bill presents a case of diversity of citizenship only, the decree of the Circuit Court of Appeals is final: An appeal to this court must be dismissed.

An allegation in a pleading that by reason of contracts with a municipality plaintiff had a vested right of property in such contracts or in their performance and that a refusal to perform amounts to deprivation of such property does not give the allegation any other character than that of one alleging ordinary breach of contract.

A constitutional question cannot be imported into the case in that manner.

Appeal from 203 Fed. Rep. 921, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the Circuit Court of Appeals, are stated in the opinion.

*Mr. B. F. Burwell* for appellant.

*Mr. Claude Weaver*, with whom *Mr. J. W. Johnson* and *Mr. V. V. Harcastle* were on the brief, for appellees.

Memorandum opinion by MR. JUSTICE McKENNA, by direction of the court.

Suit for specific performance of eighteen contracts for the paving of certain streets in the city of Oklahoma City, Oklahoma.

A temporary restraining order was applied for and denied. The suit subsequently came on to be heard on the bill, answer and proofs, and a decree was entered dismissing it. The decree was affirmed by the Circuit Court of Appeals. 203 Fed. Rep. 921.

A question of jurisdiction arises, that is, whether an appeal lies from the decree of the Circuit Court of Appeals to this court, and that depends upon the ground on which the jurisdiction of the District Court was invoked and whether, as a consequence, the decree of the Circuit Court of Appeals was final.

The bill alleges that McCormick, whom we shall designate as complainant, is a citizen and resident of St. Louis, Missouri, and that the city of Oklahoma City is a citizen and resident of Oklahoma, being a municipal corporation thereof, and that the other defendants are its officers.

The gravamen of the suit is that under an ordinance of the city, resolutions were passed by the city council at different times providing for the paving of certain streets in the city and that under due and legal proceedings had under such resolutions plans, specifications and estimates of the work were prepared by the city engineer. That in accordance with these and notices published complainant filed with the city clerk proposals and bids which were afterwards by the council duly accepted; that they, there-

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fore, became and constituted valid and binding contracts between the city and complainant for making such improvements and that he by reason of such contracts has a vested right of property in the same and is entitled to be permitted to perform the same. That subsequently the council attempted by resolution or motion to reconsider its action and to set aside the awards, in violation of complainant's rights. That he tendered formal written contracts and requested the acting mayor to execute them, but that officer refused to do so or to approve the bonds presented therewith. That complainant has done in all other particulars the things required to be done and performed by him and had done some work under his contracts before they were attempted to be set aside. That unless restrained the city will deprive complainant of the privilege of making the improvements and prevent him from making the profits thereon, which would amount to at least \$45,000; that the attempt of the city to set aside the awards to complainant "is in violation of the Constitution of the United States and in violation of the constitution and laws of the State of Oklahoma, and is an attempt to deprive this complainant of property without due process of law."

These are the general outlines of the bill and they are sufficient to show that diversity of citizenship was alleged and, in a general way, that the Constitution of the United States and of the State of Oklahoma were violated. The basis of the latter allegation is that complainant had binding contracts with the city which the city refused to permit him to perform. Their breach is alleged and nothing more, and the allegation gets no other quality or character by the assertion that complainant had a "vested right of property" in the contracts or their performance and that to take this away is a deprivation of property without due process of law. Nor would such be the result if complainant had averred that the circumstances amounted

to an impairment of the obligation of his contract, a contention which he in effect urged upon the oral argument.

The case, therefore, falls under the ruling in *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142, and subsequent cases.

In *Dawson v. Columbia Trust Company*, 197 U. S. 178, 181, it was said that the mere fact that a city is a municipal corporation does not give to its refusal to perform a contract the character of a law impairing its obligation or depriving of property without due process of law. *St. Paul Gas Light Co. v. St. Paul*, *supra*, was adduced.

In *Shawnee Sewerage & Drainage Co. v. Stearns*, 220 U. S. 462, 471, it was said: "The breach of a contract is neither a confiscation of property nor a taking of property without due process of law."

It follows that the bill presents a case of diversity of citizenship only and the decree of the Circuit Court of Appeals was final.

We may observe that that court and the District Court decided that there were no contracts consummated by complainant with the city.

*Appeal dismissed.*